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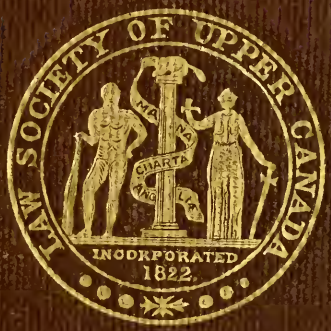

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A

PRACTICAL AND CONCISE MANUAL

OF THE

LAW RELATING TO PRIVATE

TRUSTS AND TRUSTEES.

1396

BY

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TO

THE RIGHT HONOURABLE HARDINGE STANLEY

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN

This Work

IS

BY HIS LORDSHIP'S PERMISSION

MOST RESPECTFULLY DEDICATED.

PREFACE.

IN writing this Manual, it has been the author's desire to produce a book bearing the same relation to Mr. LEWIN's elaborate treatise as Mr. HAWKINS' Work on the Construction of Wills bears to that of Mr. JARMAN; that is to say, a book of a really practical, but concise, character.

The law libraries are rich in great works of reference, the store-houses, so to speak, of the Law; but they are, in a great measure, merely collections of "that codeless myriad, that wilderness of single instances," from which it requires many years of study and experience to extract general principles. That this is so was vigorously expressed by the late Sir JAMES FITZJAMES STEPHEN in the preface to his Digest of the Law of Evidence, where he said: "It becomes obvious, that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books on the subject. No doubt such knowledge is to be gained. Experience gives by degrees, in favourable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. *He gets to see that it is shorter and simpler than it looks*, and to understand that the

innumerable cases, which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles."

That great lawyer, the late Sir GEORGE JESSEL, also pointed out that "the only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him" (*a*).

Now, in this Work the author has endeavoured to follow out the thought expressed by these great lawyers—to extract and formulate the *principles* of the law of Private Trusts in a Code of eighty-two articles. By way of illustration all the important modern decisions, and a fair collection of the more ancient ones, have been given; so that the reader is enabled to see, at a glance, the *law* (*i.e.*, the *principle*) governing any particular point, and then he is further presented with a series of decided cases which prove, illustrate, and explain the application of that principle.

Modern cases have been chosen in preference to ancient ones, because, as has been truly said, "the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. The doctrines are progressive,

(*a*) L. R., 13 Ch. D. 712.

refined, and improved; and *if we want to know what the rules of Equity are, we must look rather to the more modern* than the more ancient cases" (*b*).

For reasons above stated, it is hoped (and perhaps in this Preface to the Sixth Edition it may be permissible to say, believed) that this Work has proved of some use to practitioners. To render it more useful still, considerable additions have been made to the present Edition. No less than two hundred and thirty additional cases have been noted, including those reported in the Law Reports for August, 1904; Article sixty-three is entirely new; an attempt has been made to grapple with the problems presented by the decision in *Re New;* the conflict between the older and more modern decisions as to precatory words has been dealt with in more detail; and the index has been greatly enlarged.

But, in addition to practitioners, there is the large class of students. It is not expected that they will be able to *remember* all the illustrative cases, nor is there any need to burden the memory with innumerable examples, so long as the *principles* are mastered. Nevertheless, examples are necessary, not merely to elucidate broad principles, but also to practise the beginner in the difficult art of applying them to complicated facts.

A person of ordinary industry and capacity can easily master the eighty-two Articles of this Work,

(*b*) *Per* Sir GEO. JESSEL, M.R., in *Re Hallett, Knatchbull* v. *Hallett*, L. R., 13 Ch. D., at p. 710.

and may, without great effort, remember the main facts of such of the illustrative cases as are specially named in the body of the text, and are what may be called "leading." A student who has done that, will it is conceived possess such knowledge of the principles upon which the court acts with regard to Private Trusts as will enable him to pass his examination without difficulty, and to answer all such questions as occur in the every-day experience of a general practitioner.

The Publishers have appended to this Edition a series of questions, by the author's friend and former pupil, Mr. C. O. Blagden, for the self-examination of students, which will doubtless be found useful.

ARTHUR UNDERHILL.

5, NEW SQUARE,
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ADDENDA AND CORRIGENDA.

Page 19, line 2 from bottom.	The word "adequate" *should be* "aliquot."
Page 88, line 18 ...	After the word "creditors" *substitute* "at" for "as."
Page 162, note (*k*)...	*For* "63" *read* "64."
Page 179, note (*b*)...	*Add* "The same principle would, it is conceived, apply to the raising of portions by mortgage, and the trustees would be justified in raising those presently payable without raising the whole, provided at the date the estate was an ample security for the entire sum charged by the settlement (see *Wynter* v. *Bold*, 1 S. & St. 510; *Sheppard* v. *Wilson*, 4 Ha. 392, 394; *Otway-Cave* v. *Otway*, 2 Eq. 725; *Gillibrand* v. *Goold*, 5 Sim. 149)."
Page 193, note (*u*)...	*Add* "The interest would now be 3 per cent. The life tenant is, of course, entitled, in addition, to the income of the sums set apart as capital (*Re Woods*, *Gabellini* v. *Woods*, (1904) 2 Ch. 4)."
Page 201, note (*l*)... ,, 204, note (*e*)...	*Add* "and see *Re Farnham Law Union, &c. Co.* v. *Hartopp*, (1904) W. N. 138."
Page 212, line 11 from bottom.	*Should read* "Executors may do so," etc.
Page 299, note (*c*)...	*Add* "A power not expressly limited in point of duration is not necessarily void; for there is a presumption that it was intended to cease when all beneficial interests should have vested absolutely in possession in persons *sui juris*. Even where it can be gathered that the settlor intended

it to be exercised after that event 'for facility of division,' it can still be exercised within the period allowed by the rule against perpetuities (*Re Sudeley and Baines, sup.*). But where no *successive* interests are given, and the property vests absolutely in persons *sui juris directly the settlement takes effect*, and no intention can be gathered that the power was merely given for facility of division, it will be void for remoteness (*Re Dyson and Fowke, sup.*)."

Page 339, note (*e*) ... *For* "sect. 34" *read* "sect. 341."

Page 345 ... ... *Strike out note* (*r*).

Page 375, upper side-note. *Substitute the word* "fraudulently" *for the words* "without fraud."

Page 398, margin ... "Art. 77" *should read* "Art. 78."

A

PRACTICAL AND CONCISE MANUAL

OF THE LAW RELATING TO PRIVATE

TRUSTS AND TRUSTEES.

DIVISION I.

PRELIMINARY DEFINITIONS.

ART.		PAGE
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2.	*Definitions of Legal and Equitable Estates*	5
3.	*Definitions of Express and Constructive Trusts*	8
4.	*Definitions of Simple and Special Trusts*	10

ART. 1.—*Definitions of Trust, Trustee, Trust Property, Beneficiary, and Breach of Trust.*

A trust is an equitable obligation imposing upon a person (who is called a trustee) the duty of dealing with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que* trust), of whom he may himself be one, and any one of whom may

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enforce the obligation (*a*). Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.

Comparison of the above definition with others.

More than one definition of a trust is to be found in the recognised text books; but none of these learned and excellent works contain a definition which is altogether satisfactory.

Lord Coke's definition.

The late Mr. Lewin, in his treatise on Trusts, adopts Lord COKE's definition of a use as equally applicable to a trust, namely, "A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, for which *cestui que trust* has no remedy but by subpœna in Chancery." This, however, is applicable to real estate only, and certainly not to trusts of choses in action, the equities attaching to which are, generally speaking, not merely collateral. The expression "some other" is also apt to mislead, and to convey the erroneous impression that the trustee must be some other than either the person who creates the trust, or the beneficiary under it. Then, so far as the remedy is concerned, the Court of Chancery no longer exists, and all branches of the High Court take cognizance of equitable rights, although the Chancery Division is the proper branch in which to enforce express trusts.

Definitions of Mr. Spence and Mr. Justice Story.

Another eminent author, the late Mr. Spence, defines a trust as "a beneficial interest in, or beneficial ownership of real or personal property, unattended with the possessory or legal ownership thereof"; and this definition was adopted by the late Mr. Snell, and the late Judge Josiah Smith, in their respective works on Equity. An almost similar definition is given by Mr. Justice STORY, in his comprehensive work on Equity, where he says: "A trust may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof."

(*a*) The reader is referred to Mr. Walter G. Hart's very interesting article on "What is a trust," in the Law Quarterly Review for July, 1899.

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These definitions, however, do not seem to be definitions of a trust at all, but rather of the beneficial interest of persons in whose favour a trust is created.

Mr. H. A. Smith's definition.

Mr. H. A. Smith in his "Principles of Equity" also points out, that Mr. Spence's definition omits to take account of the most important class of trusts, viz., special trusts, in which the object of the trust is the performance of some particular duty, rather than the vesting of beneficial ownership in some person other than the legal owner; and he defines a trust as "a duty, deemed in equity to rest on the conscience of a legal owner." This definition, although decidedly superior to those hitherto discussed, is nevertheless not quite accurate, being both too wide and too narrow. It is too wide; because it would be almost, if not quite, as good a definition of any other equitable obligation. It is too narrow; because a person may be a trustee, without being the *legal* owner of property; *e.g.*, he may be trustee of an equity of redemption, or of an equitable interest arising under another trust, or even of an expectancy.

Nature of a trust.

I have therefore felt myself obliged to reject all these definitions, and to endeavour to construct an independent one. And in doing this it became necessary to consider the nature of a trust.

Sir F. Pollock's view.

Sir Frederick Pollock, in his learned work on Contracts, considers that a trust is, in its inception, a form of contract; but admits that the complex relations involved in a trust, cannot be conveniently reduced to the ordinary elements of a contract, and that there is sufficient justification for the course adopted by all English writers of treating trusts as a separate branch of law. And indeed, there is at least one important distinction between contracts and trusts, viz., that an executed trust may be enforced by a person for whose benefit it was made, although he may not have been party or privy to it.

Analogy of trusts and bailments.

At the same time, there can be no doubt that trusts are somewhat analogous to that class of common law cases, which lie on the border line between contract and tort (of

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which *Coggs* v. *Bernard* (*b*) is the leading instance), the principle of which is, that the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in its performance, a principle which has been adopted in an accentuated form in dealing with express trusts.

Distinctive character of trusts.

However, whatever a trust may be in its inception, it radically differs from all other duties in this, that prior to recent legislation it was a duty which could not be enforced at common law, and was only enforceable in Chancery on the ground that a breach of the duty was so unconscientious as to call for the equitable interference of the Chancellor.

Analysis of a trust.

It is therefore convenient to regard a trust as "an obligation," that is to say, "a tie of equity (*vinculum juris*), whereby one person is bound to perform or forbear some act for another" (*c*). The obligation is, or at all events in its inception was, an equitable one, enforceable only in courts of equity, although, by recent legislation, all courts take cognizance of trusts. It is also an obligation relating exclusively to property. An obligation to do or forbear some act not relating to property is not a trust, whatever else it may be. For a trust is purely a creature of equity, and equity concerns itself solely with property.

It is, further, an obligation, the due performance of which necessarily implies that the trustee has some control over the property which is the subject of the trust, for otherwise he would be unable to deal with it for the benefit of the beneficiaries; and although, as will be seen hereafter, in the case of simple trusts, the control is merely nominal (consisting solely in the trustee being the depositary of the legal title), yet some *scintilla* of control is absolutely necessary to the existence of a trust.

Persons are sometimes called trustees who are not so in the ordinary sense, *e.g.*, trustees for purposes of the Settled Land Acts and trustees of strict settlements with powers of sale to be carried out by revocation of uses and new

(*b*) 1 Sm. L. C. 167; and see also *Foulkes* v. *Metropolitan District Rail. Co.*, 5 C. P. D. 157.

(*c*) Encyc. Brit. Art. "Obligation."

appointment. In both cases such persons may *become* trustees when they receive purchase-money or when they exercise the powers confided to them, but until then they are not trustees in the sense in which the word is used in this work, but merely donees of powers.

Illustrations

A couple of examples will illustrate the above remarks. A testator bequeaths £1,000 to A., upon trust to invest it in government stock, and to pay the dividends to B. for life, and after B.'s death to sell the stock and divide the proceeds among B.'s children. A trust is at once created in A. In other words, he would be under an equitable obligation to deal with the £1,000 (the trust property) for the benefit of B. and B.'s children (the beneficiaries) according to the testator's directions.

A., by deed, declares that he holds £1,000 government stock standing in his own name and belonging to him, in trust to pay the dividends to himself for life, and after his death, upon trust to pay the dividends to his wife for life, and, after the death of the survivor of them, upon trust to sell the stock and divide the proceeds among their children. Here A. is both creator of the trust, trustee, and *one* of the beneficiaries. If he were the *sole* beneficiary, the trust would never arise, for a man cannot enforce a trust against himself. Or, if he became such by surviving his wife and children, and becoming the sole personal representative and next-of-kin of the latter, it would cease; because the trusteeship would merge and be extinguished in the beneficial ownership.

ART. 2.—*Definitions of Legal and Equitable Estates.*

The interest of a beneficiary in trust property is called an equitable estate or interest, because it was originally only recognised in courts of equity. A legal estate or ownership, on the other hand, is that proprietary interest which

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has been acquired with all the formalities which are required by the common or statute law for conferring perfect ownership, or which has devolved by legal descent. A trustee usually, but not necessarily or always, has the legal ownership of trust property.

Distinction still important.

When the Judicature Act of 1873 (36 & 37 Vict. c. 66) was first passed, it was thought by many that the former distinctions between legal and equitable estates were abolished, and that thenceforth every equitable interest would be, in effect, a legal one. Such persons, however, overlooked the fact that, even if the fusion of law and equity justified the application of the adjective "legal" to rights and interests formerly ignored by the common law, and invented by judicial equity, such a change of nomenclature would not do away with the fundamental and ineradicable distinctions which exist between legal and equitable estates. As Lord SELBORNE said, in introducing the Judicature Bill into the House of Lords, "If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate. The legal estate is in the person who holds the property for another; the equitable estate is in the person beneficially interested. The distinction between law and equity is, within certain limits, real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded, although under our presen system it is often pushed beyond these limits" (*d*).

The old legal estate, therefore, still subsists; and although equitable estates are now recognised by all branches of the Supreme Court (and may therefore in a sense be called legal), it has been found more convenient to retain the old nomenclature, signifying, as it does, a real and substantial difference, which would still exist, even although the *terms* legal and equitable estates were abolished.

Estate of trustee not necessarily legal.

It must not, however, be assumed that the estate of a trustee is always legal. The estate of the beneficiary is always equitable, so long as the trust subsists; but so also

(*d*) Hansard (N.S.), Vol. 214, p. 333.

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may be the estate of the trustee. For instance, the trust property may consist of land mortgaged to a third party. In that case the legal estate would be in the mortgagee, an equity of redemption (which is a purely equitable estate) in the trustee, and another equitable estate in the beneficiary.

Importance of difference between legal and equitable estates.

The difference between legal and equitable estates is not merely of theoretical interest. In cases of breach of trust (as will appear later on in this treatise (*e*)), it is of vital importance, owing to the maxim that "Where the equities are equal the law prevails." In other words, where a question of priority arises between two claimants, each of whom has an equally just claim, then, if one of them has the legal estate, he will be preferred to the other, even though the title of such other arose first in point of date (*f*).

Illustrations.

To take a few examples: A. conveys freeholds by a formal deed of grant to B. in fee simple, in trust to receive the rents and pay them to C. during his life, and after C.'s death in trust to sell the land and divide the proceeds among C.'s children equally. Here B., the trustee, would have the legal estate. According to the old doctrine of the of the common law, he would be the absolute owner. The estates of C. and C.'s children, on the other hand, are equitable; because formerly they were only recognised by courts of equity, and still retain the incidents annexed to them by equity, although now *recognised* by all courts.

A., the owner of a copyhold estate, on the marriage of his daughter, C., covenants with her and her intended husband that he will duly vest the copyholds in B., upon trusts similar to those stated in the last illustration. Here, until the copyholds are duly surrendered by A., and until B. is duly admitted tenant on the court rolls, the latter has a mere equitable estate, although he is trustee. For copyholds can only be conveyed at common law by surrender and admittance.

(*e*) *Infra*, Art. 81.

(*f*) The reader who is desirous of verifying this statement is referred to the following cases which have arisen since the Judicature Acts came into operation, viz.: *Cave* v. *Cave*, 15 Ch. D. 639; *Northern Counties Ass. Society* v. *Whipp*, 26 Ch. D. 482; *Garnham* v. *Skipper*, 34 W. R. 135; *Taylor* v. *Blacklock*, 55 L. J. Ch. 99; *Re Vernon*, 35 W. R. 225; and see also as to the value of a legal estate, *Fox* v. *Buckley*, 3 Ch. D. 511; and *Re Brown, Dixon* v. *Brown*, 32 Ch. D. 597.

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A., by will, devises a freehold estate to B. in fee simple, *to the use* of C. during her life, and after C.'s death, to the use of B., his heirs and assigns, for ever, in trust to sell, and divide the proceeds among C.'s children. Here, by virtue of the Statute of Uses, the legal estate is split up into a life estate in C. (who is accordingly a *legal* tenant for life, and not a mere beneficiary under a trust), with remainder to B. in fee simple. The trust, therefore, is a trust of the reversion, and does not become an active trust until the death of C. When that event happens, the trustee steps into possession of the rents and profits, and his fiduciary duties become active.

ART. 3.—*Definitions of Express and Constructive Trusts.*

In relation to their inception, trusts are divisible into two classes:

(a) An express trust means a trust created by words importing an intention to create it. If the words be contained in a document, the document is called a settlement (*g*), whether it be a simple writing, a deed, or a will. The person who provides the trust property is called the settlor.

(b) A constructive trust means a trust which is not created by words importing intention to create a trust, but is implied by courts of equity, in order to prevent the inequitable acquisition of another's property.

Reasons for this classification.

This classification seems to the present writer preferable to that usually adopted, of express, implied, and constructive

(*g*) Strictly speaking, the word settlement is restricted to documents under which beneficiaries take in succession, but for the purposes of this work it is used in a wider sense.

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trusts. Some writers class trusts declared by words of prayer, desire, hope, or the like (precatory words), as "implied trusts." Others, again, class what are known as resulting trusts (that is, trusts arising by implication of equity in favour of a settlor where an express trust has failed, or the like), as "implied trusts." It is submitted, however, that trusts arising from precatory words are essentially express trusts—that is to say, they are *expressed*, although in ambiguous and uncertain language. Resulting trusts, on the other hand, are clearly constructive, as they can only arise in the absence of express direction. Moreover, the whole of the law as to express trusts is applicable to trusts created by precatory expressions; the question is purely one of interpretation, and there is, therefore, no justification for treating them as a separate and distinct class.

Illustrations: Direct express trust.

A., by his will, devises property to B., *in trust* for C.; that is an express trust.

Express trust by precatory words.

A., by his will, gives property to B., in full confidence that he will apply it for the benefit of C. and her children. If, on the whole will, the court thinks that the expression of confidence was intended to be imperative, a trust will be created. Trusts created by ambiguous words of this character would be called by some writers implied trusts.

Resulting trust.

A., by his will, gives property to B. in trust for C., who dies before the testator. Here the trust in favour of C. lapses; but, as it is obvious that the testator never intended that B. should have the beneficial interest in the property, equity *constructs* or implies a trust in favour of A.'s heir, or residuary devisee, or personal representatives, or residuary legatee, as the case may require. That is an example of that species of "constructive trust" which is known as a "resulting trust," from the Latin verb *resultare*, to spring back.

Pure constructive trust.

A trustee of a leasehold house, at the termination of the lease, uses his position to induce the landlord to renew the lease to him. Here, equity regards the attempt of the trustee to snatch a personal benefit for himself in antagonism to his beneficiaries, as an act of ill-faith, and will

Art. 3. consequently decree that the trustee must hold the new lease upon the same trusts as he held the old and expired one. That is an instance of a constructive trust, which is not a resulting one.

ART 4.—*Definitions of Simple and Special Trusts.*

In relation to the nature of the duty imposed on the trustee, trusts are divided into simple and special trusts :

(a) A simple trust is a trust in which the trustee is a mere passive depositary of the trust property, with no active duties to perform. Such a trustee is called a passive trustee.

(b) A special trust is a trust in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor, and is called upon to exert himself actively in the execution of the settlor's intention. The trustee of a special trust is called an active trustee.

Illustration of simple trust.

A. devises property unto and to the use of B. in trust for C. Here the trust is a simple trust, as the only duty which B. has to perform is to convey the legal estate to C.; and B. is a passive trustee.

Illustration of special trust.

Again, if the trust had been during C.'s life to collect the rents and profits, and to pay thereout the cost of repairs and insurance, and to pay the residue of such rents and profits to C. during his life, and after C.'s death to hold the property in trust for D., the trust would have been a special trust during the life of C., and B. would have been an active trustee. For the trustee during that period would

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have had active duties to perform. But upon C.'s death, the trust would have become a simple trust, and B. a passive trustee; inasmuch as the active duties originally attached to the trustee's office lapsed by the death of C., and the only duty which remained was to convey the legal estate to D.

DIVISION II.

EXPRESS OR DECLARED TRUSTS.

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CHAPTER I.

INTRODUCTION.

ART. 5.—*Analysis of an Express or Declared Trust.*

(1) An express trust binding on the settlor is (*primâ facie*) created if—

(a) he has used language importing an intention to create a trust (*a*) in favour of others (*b*) ;

(b) the trust is either created by will, or based upon valuable consideration ; *or* (if neither) the trust property has been either transferred to a trustee, or the settlor has constituted himself a trustee of it for the purposes of the trust (*c*) ;

(*a*) Art. 6. (*b*) Art. 7. (*c*) Art. 8.

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(c) the trust property is of such a nature as to be capable of being settled (*d*);
(d) the object of the trust is lawful (*e*);
(e) the settlor has complied with the provisions of the law as to evidence (*f*).

These *primâ facie* essentials will be examined at length in Chapter II.

(2) But a trust, *primâ facie* valid, may yet be impeachable—

(a) by the settlor or his sequels in title by reason of his incapacity (*g*); or the incapacity of the beneficiaries (*h*); or by reason of some mistake made by, or fraud practised on, the settlor, at its creation (*i*); or
(b) by the settlor's creditors by reason of its having been made with a fraudulent intention to defeat or delay them (*k*); or because it infringes the provisions of the Bankruptcy Acts (*l*); or
(c) by future purchasers of the property from the settlor without notice of the trust, where the trust property is land, and the trust was intended by the settlor to defeat the claims of future purchasers (*m*).

These latent flaws will be considered in Chapter III.

(3) Lastly, the circumstances under which the trust was created, may be such as to necessitate a very liberal construction being given to the language in which it was declared, so as to give effect to the manifest intentions of the settlor (*n*). These questions of construction will be dealt with in Chapter IV.

(*d*) Art. 9.
(*e*) Art. 10.
(*f*) Art. 11.
(*g*) Art. 12.
(*h*) Art. 13.
(*i*) Art. 14.
(*k*) Art. 15.
(*l*) Art. 16.
(*m*) Art. 17.
(*n*) Art. 18.

CHAPTER II.

MATTERS ESSENTIAL TO THE PRIMA FACIE VALIDITY OF AN EXPRESS TRUST.

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ART. 6.—*Language evincing an intention to create a Trust.*

(1) No technical expressions are needed for the creation of an express trust (*a*). It is sufficient if the settlor indicates an intention to create a trust, and points out with reasonable certainty—

(a) the trust property (*b*) ;

(b) the beneficiaries ; and

(c) the purpose of the trust.

(2) In addition to imperative directions (*c*), trusts may be created by—

(a) an agreement for valuable consideration, or a direction in a will, that a trust *shall* be created (*d*) ;

(*a*) *Dipple* v. *Cortes*, 11 Hare, 183 ; *Cox* v. *Paye*, 10 Hare, 163.

(*b*) *Knight* v. *Knight*, 3 Beav. 148, affirmed, H. L., *sub nom. Knight* v. *Boughton*, 11 Cl. & F., at p. 548, and explained by C. A. in *Re Oldfield, Oldfield* v. *Oldfield*, [1904] 1 Ch. 549.

(*c*) As to how far gifts "upon condition" or "subject to legacies" or the like, create trusts, as distinguished from charges or conditions, see *Cunningham* v. *Foot*, 3 App. Cas. 974, and cases there cited.

(*d*) See *Davenport* v. *Bishopp*, 2 Y. & C. 451 ; *Dodkin* v. *Brunt*, 6 Eq. 580 ; *Lee* v. *Lee*, 4 Ch. D. 175 ; *Re Michell*, 6 Ch. D. 618 ; *Robson* v. *Flight*, 4 De G. J. & S. 608 ; and as to directions to settle,

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(b) a power of appointment among a class (*e*), unaccompanied by a gift over in default of appointment (*f*), if there appears to be a general intention to benefit the objects of the power (*g*) ;

(c) a gift by will to a person, followed by precatory words expressive of the donor's request, recommendation, desire, hope or confidence, that the property will be applied in favour of others, if on the whole will it appears that the testator intended the words to be imperative (*h*). The current of modern authority is, however, against construing precatory words as imposing trusts (*i*).

PARAGRAPH (1).

Reasons for the above rule

The latitude of expression allowed to the creator of a trust is an instance of the maxim that "Equity regards the intention rather than the form." Wherever the intent is apparent, it will (other matters being in order) be carried into effect, however rudely or elliptically it may have been expressed.

Of course, the words "in trust for," or "upon trust to," are the most proper for expressing a fiduciary purpose ; but wherever a person vests property in another, and shows an intention that it is to be applied for the benefit of third parties who are sufficiently pointed out, an express

Wise v. *Piper*, 13 Ch. D. 848 ; *Re Parrott*, *Walter* v. *Parrott*, 33 Ch. D. 274. Such future trusts are known as executory trusts, as to which, see Art. 18, *infra*.

(*e*) This principle has been extended to a power of appointment in favour of a single individual, *sed quære*, *Tweedale* v. *Tweedale*, 7 Ch. D. 633 (see *infra*, p. 21) ; *Wheeler* v. *Warner*, 1 S. & S. 304.

(*f*) *Burrough* v. *Philcox*, 5 M. & C. 92 ; *Grierson* v. *Kirsopp*, 2 Keen, 653 ; *Brown* v. *Higgs*, 4 Ves. 708.

(*g*) *Re Weekes*, [1897] 1 Ch. 289.

(*h*) See *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321.

(*i*) *Re Diggles*, *Gregory* v. *Edmondson*, 39 Ch. D. 253 ; *Re Adams and Kensington Vestry*, 27 Ch. D. 394 ; *Re Hamilton*, *Trench* v. *Hamilton*, [1895] 1 Ch. 373 ; *ib.* 2 Ch. 370, and cases there cited and *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321.]

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Express direction.

trust will be created, whatever form of words may have been used. For instance, A. devises, or grants freehold lands, unto and to the use of B., and "directs" him to sell it and pay the proceeds to C., or directs him to apply the property for the benefit of C. In all these cases a trust is created in favour of C. (*k*), although the word "trust" is not used.

No trustee named.

Moreover, where a trust is clearly intended, then (subject to the rules as to voluntary trusts set forth in Art. 8, *infra*) the mere omission to appoint a trustee will not invalidate the trust; for equity never allows a trust to fail for want of a trustee. Thus, before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), where money was bequeathed to a married woman *for her separate use*, the executors were regarded in equity as trustees for the wife; because the intention to create a trust (by which alone the separate use could have any effect) was clear (*l*).

Direction in a will that land shall be sold.

Again, if before the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), a testator directed a sale of lands and a division of the proceeds, but named no person to sell, and did not in terms devise the property, it descended at law to his heir; but the latter was regarded in equity as a mere passive trustee, who was bound to convey the legal estate to trustees appointed by the court for the purpose of carrying out the trust (*m*). In cases since the Land Transfer Act, 1897, however, it is apprehended that the personal representatives of the testator would be the persons to sell the property if of freehold tenure.

Failure of trustee.

So if the trustee appointed, fails, either by death (*n*), or disclaimer (*o*), or incapacity (*p*), or otherwise (*q*), the

(*k*) *White* v. *Briggs*, 2 Ph. 583.

(*l*) *Rolfe* v. *Budder*, Bunb. 187; *Tappenden* v. *Walsh*, 1 Ph. 352; *Prichard* v. *Ames*, T. & R. 222; *Green* v. *Carlill*, 4 Ch. D. 882; and see *Bennett* v. *Davis*, 2 P. W. 216.

(*m*) *Robson* v. *Flight*, 4 De G. J. & S. 608; *Pitt* v. *Pelham*, Free. 134.

(*n*) *Moggridge* v. *Thackwell*, 3 B. C. C. 517; *Att.-Gen.* v. *Downing*, Amb. 552; *Tempest* v. *Lord Camoys*, 35 Beav. 201.

(*o*) *Backhouse* v. *Backhouse*, quoted by Lew. 678; *Robson* v. *Flight*, 4 De G. J. & S. 608.

(*p*) *Sarley* v. *Clockmakers Co.*, 1 B. C. C. 81.

(*q*) *Att.-Gen.* v. *Stephens*, 3 M. & K. 347.

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trust does not fail, but fastens upon the conscience of any person (other than a purchaser for value without notice) into whose hands the property comes (*r*); and such person holds it as a passive trustee, whose only duty is to convey it to new trustees when properly appointed (*s*).

Trusts intended may yet be void for uncertainty.

However, intention to create a trust is not of itself sufficient (even where the most direct and imperative words of confidence are used (*t*)) if either the property, or the persons to be benefited, or the way in which they are to be benefited, be not indicated with reasonable certainty (*t*).

Illustrations of uncertainty as to the property.

Thus, where a testator gives property to, or in trust for, his wife, and directs that *such part of it as may not be required by her* shall, after her death, be held in trust for his children, the latter trust is void for uncertainty, for no one can say how much the wife may or may not require (*u*).

On similar grounds directions to a legatee "to remember" certain persons (*x*), or "to give what should remain at her death" (*y*), or "to reward very old servants and tenants according to their deserts" (*z*), or (after an absolute gift to a wife) a direction that at her death "as to such parts of my estate as she shall not have sold or disposed of" the same should be held in trust for certain other persons (*a*), have all been held void for uncertainty in the property.

Uncertainty as to the beneficiaries, or as to the

The same principle is equally applicable where the uncertainty arises in relation either to the persons intended to be benefited, or to the way in which or the period for

(*r*) See *per* WILMOT, C.J., *Att.-Gen.* v. *Lady Downing*, Wil. 21, 22.
(*s*) *Robson* v. *Flight*, 4 De G. J. & S. 608.
(*t*) See *Mussoorie Bank* v. *Raynor*, 7 App. Cas., at p. 331.
(*u*) *Per* Sir A. HOBHOUSE, in *Mussoorie Bank* v. *Raynor*, 7 App. Cas., at p. 331.
(*x*) *Bardswell* v. *Bardswell*, 9 Sim. 319.
(*y*) *Parnall* v. *Parnall*, 9 Ch. D. 96; *Sprange* v. *Barnard*, 2 B. C. C. 585; *Tibbits* v. *Tibbits*, 19 Ves. 656; *Pope* v. *Pope*, 10 Sim. 1.
(*z*) *Knight* v. *Knight*, 3 Beav. 148; and see *Stead* v. *Mellor*, 5 Ch. D. 225.
(*a*) *Re Jones*, *Richards* v. *Jones*, [1898] 1 Ch. 438, distinguished in *Re Sanford*, *Sanford* v. *Sanford*, [1901] 1 Ch. 939. For other examples of trusts void for uncertainty in the property, see *Sale* v. *Moore*, 1 Sim. 534; *Hoy* v. *Master*, 6 Sim. 568; *Curtis* v. *Rippon*, 5 Mad. 434; *Cowman* v. *Harrison*, 10 Ha. 234; and *Green* v. *Marsden*, 1 Dr. 646.

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way in which the property is to be applied.

which, the property is to be dealt with for their benefit. In all such cases the trust is void.

Thus where a testatrix bequeathed £500 to trustees to be applied in keeping up a tomb until the expiration of the period of twenty-one years from the death of the last survivor of all persons living at her death; it was held that quite apart from any question whether the rule against perpetuities was infringed, the trust was void for uncertainty, as it would be impossible to ascertain when the last life would be extinguished (*b*).

Difference between uncertainty as to the property and uncertainty as to beneficiaries or the details of the trust.

There is, however, an important difference to be noted between trusts void for uncertainty as to the property and those void for uncertainty as to the beneficiaries, or as to the way in which the property is intended to be applied for their benefit. Where it is held that there is uncertainty as to the property intended to be settled, it is obvious that no further question can arise; for if there is no property capable of identification there is nothing to litigate about. But where the property is described with sufficient certainty, and the words actually used, or the surrounding circumstances, make it clear that, although the donor has not sufficiently specified the objects of his bounty or the way in which the property was intended to be dealt with, yet he never meant the trustee to take the entire beneficial interest, it is different; and in such cases (which are treated of in Division III.) the law implies a resulting trust in favour of the donor or his representatives.

PARAGRAPH (2) (a).

Agreements to create trusts.

The rule that a valid agreement to create a trust *in futuro*, is sufficient to create a trust *in præsenti*, so as to bind the property in the hands of the parties, or those having notice of the agreement, depends on the maxim that "Equity regards that as done which ought to be done." It follows, therefore, that where a trust is alleged to have been created by an *agreement* to do something, its validity depends on the question whether the agreement is one of which Courts

(*b*) *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936.

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of Equity would decree specific performance. If it was merely a voluntary promise (or even a covenant under seal, not supported by valuable consideration), no trust will be created; for Equity gives no assistance to volunteers, and consequently there is nothing which can, under the foregoing maxim, be considered as done, by the court. This distinction between trusts depending on contracts, and trusts actually declared, will be emphasised in Art. 8.

Contracts to create trusts.

The most usual instance of trusts arising out of contract is afforded by marriage articles. Not infrequently it would take so long to draw up a formal settlement, that the marriage would be unduly delayed if it were postponed until the settlement was executed. In such cases, articles of agreement are signed, by which, in consideration of the marriage, the parties agree to execute a formal settlement, vesting certain property upon trusts indicated more or less roughly. Thereupon Equity, regarding that as done which ought to be done, fastens a trust on the property, and treats any dealings with it inconsistent with the agreement, not only as a breach of contract, but also as a breach of trust.

A marriage settlement contains a covenant by the intended husband that he will transfer to the trustees any property which may accrue to him in right of his wife during the marriage. Upon any property becoming vested in him *jure mariti*, he immediately becomes a trustee of it, upon trust to transfer it to the trustees; and until that is done he himself holds it upon the trusts declared in the settlement (*c*).

So where a father, in contemplation of his daughter's marriage, *contracts* to leave her a specified sum, or an adequate part of his estate, although, if he dies without fulfilling his promise, it cannot be specifically performed

(*c*) *Lewis* v. *Madocks*, 8 Ves. 150; *Wellesley* v. *Wellesley*, 4 M. & C. 561; *Lyster* v. *Burroughs*, 1 Dru. & War. 149; *Hastie* v. *Hastie*, 2 Ch. D. 304; *Agar* v. *George*, *ib.* 706; *Cornmell* v. *Keith*, 3 Ch. D. 767; *Re Turcan*, 40 Ch. D. 5; *Re Clarke*, *Coombe* v. *Carter*, 36 Ch. D. 348. But as to the effect of the covenantor's bankruptcy *before* the expectancy vests, see *Re Reis*, [1904] W. N. 116, which will doubtless be fully reported in [1904] 2 K. B.

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by reason of his death, yet his estate will be bound to make good the contract (*d*). There must, however, have been a binding contract; a mere representation of intention will not suffice, even although the marriage took place on the faith of it (*e*).

PARAGRAPH (2) (b).

Powers in the nature of trusts.

With regard to trusts created by words empowering another to appoint to a class, with no gift over in default of appointment, the leading illustration is *Burrough* v. *Philcox* (*f*). There, a testator directed that certain property should be held in trust for his two children for life, with remainder to their issue, and declared, that if they should both die without issue, the survivor of them should have power to dispose of the property by will amongst the testator's nephews and nieces, or their children. The testator's children having died without issue, and without any appointment having been made by the survivor, it was held that a trust was created in favour of the testator's nephews and nieces, and their children, subject only to a power of selection and distribution. Lord COTTENHAM said: "Where there appears a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class."

So, where a testator gave personalty to his widow for life, and to be at her disposal by her will, "therewith to apply part for charity, the remainder to be at her disposal among my relations, in such proportions as she may be pleased to direct"; and the widow died without appointing the property; it was held that half was to be held in trust

(*d*) *Luders* v. *Anstey*, 4 Ves. 501; 5 Ves. 217; *Hammersley* v. *de Biel*, 12 Cl. & F. 45, 62n; *Coverdale* v. *Eastwood*, 15 Eq. 121; *Synge* v. *Synge*, [1894] 1 Q. B. 466.

(*e*) *Hammersley* v. *de Biel*, *supra*; *Jorden* v. *Money*, 5 H. L. Cas. 185; *Maddison* v. *Alderson*, 8 App. Cas. 473; *Re Fickus*, *Farina* v. *Fickus*, [1900] 1 Ch. 331.

(*f*) 5 My. & C. 72.

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for charitable purposes, and the residue for the testator's relatives according to the Statutes of Distribution (*g*).

Gift over in default of appointment destroys implied trust.

The fact of there being a gift over in default of selection, is, however, fatal to any trust under the present rule, even although the gift over is void (*h*); for it is inconsistent with an intention to benefit the class unless the donee of the power exercises it. But a residuary gift is not "a gift over" for this purpose (*i*).

No implied trust unless general intention to benefit apparent.

Moreover, even where there is no gift over, there must be a general intention apparent to benefit the class. Thus, in *Re Weekes* (*k*), there was a gift to the testatrix's husband for life, with power by deed or will to dispose of the property amongst their children. ROMER, J., after elaborately examining all the decisions, pointed out that there was no *gift to such of the class* as the husband might appoint, but merely a bare power to appoint among a class, and that the mere giving of a power did not of itself show that general intention to benefit the class, which was apparent in cases where the selection only was confided to the donee of the power. This decision appears to the present writer to be inconsistent with that in *Tweedale* v. *Tweedale* (*l*), which would probably not now be followed.

PARAGRAPH (2) (c).

Precatory trusts depend wholly on interpretation

The subject of precatory trusts, *i.e.*, transfers or bequests of property to another, coupled with words of prayer, entreaty, recommendation, expectation, or the like (which according to ordinary usage would not bear an imperative connotation), is not free from difficulty, owing to the conflict between the earlier and the more modern decisions. If, however, it be borne in mind that this question is not one of *law*, but merely one of the true interpretation of the document which contains the precatory words, much

(*g*) *Salusbury* v. *Denton*, 3 K. & J. 529; *Re Caplin*, 2 Dr. & Sm. 527; *Little* v. *Neil*, 10 W. R. 592; *Gough* v. *Bult*, 16 Sim. 323; affirmed 17 L. J. Ch. 401; and see also *Re Susanni*, 47 L. J. Ch. 65; *Butler* v. *Gray*, 5 Ch. App. 26.
(*h*) *Re Sprague*, *Miley* v. *Cape*, 43 L. T. 236.
(*i*) *Re Brierley*, *Brierley* v. *Brierley*, 43 W. R. 36.
(*k*) [1897] 1 Ch. 289; and see also *Carberry* v. *M'Carthy*, 7 L. R. Ir. 328.
(*l*) 7 Ch. D. 633.

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confusion will be avoided. Regarded in that light, and applying the dictum of Lord LINDLEY, that "when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases," the conflict of authorities to a large extent becomes immaterial.

Earlier cases show a tendency to construe precatory words as imperative.

Undoubtedly the earlier cases show that Chancery judges were formerly in the habit of interpreting precatory words as being *primâ facie* euphemistic equivalents for more imperative forms, much as a master might give an order to a servant in the form of a request rather than that of a command. And historically there is justification for this view, as will be seen from the following account of the origin of precatory trusts.

According to an ancient rule of Roman law, the appointment of a female (even an only child) as heir was forbidden. In order to evade this, it became the practice of Roman fathers, to appoint a male heir, in whose honour they could confide, to restore the property to the testator's daughter. Before the time of Augustus, the performance of these trusts (*fidei commissa*) was left entirely to the honesty of the person trusted; and it is, therefore, not surprising that testators used words of entreaty or prayer, rather than of command, well knowing that the fulfilment of their wishes was dependent on the good will of the person addressed. Thus we find that Roman testators usually adopted such forms of expression as *peto*, *rogo*, *volo*, *fidei tuæ committo*, and the like. When, in the time of Augustus, *fidei commissa* became enforceable, the question arose whether wills made in the old precatory form were to be considered imperative; and Justinian settled the point by ordaining that, where the intention of the testator was clear, it should be equally effectual, whether it was expressed in direct or in precatory language.

Now much the same thing happened with us. Whatever may have been the origin of uses (the predecessors of trusts) in England, there is no doubt that, at an early stage, they were (on the Roman precedent) resorted to as a means of regaining the power of devising real estate, which had been abolished by the Norman kings. The property was given

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during the owner's lifetime to a friend, who undertook to hold it to the use of the owner during his life, and after his death to such uses as he might appoint by will. Not only did the courts of common law refuse to enforce these uses, but they were notoriously used for some time before even the Court of Chancery interfered; for in the reign of Henry IV., the Commons complained, that many feoffees to uses (trustees) alienated and charged the property confided to them, for which they stated that *there was no remedy*.

Consequently (as in the case of the Roman *fidei commissa*), a non-enforceable trust would naturally be created by the use of precatory words; and, when the Chancellors took upon themselves to enforce trusts, they would, both on grounds of reason and on the analogy of the Roman precedents, naturally regard precatory trusts as equivalent to those created by more precisely imperative forms of expression. The custom of regarding precatory expressions as imperative having been thus once established, continued to be observed by successive generations of judges as a rule of interpretation, long after the reasons on which it was founded had disappeared. However, the current has now set strongly in the opposite direction.

Old rule and modern rule as to precatory words contrasted.

As laid down in the older cases, the rule of interpretation might be stated thus: If a gift in terms absolute is accompanied by a desire, wish, recommendation, hope, or expression of confidence that the donee will use it in a certain way, a trust to that effect will attach to it (*m*). But the modern principle might be stated in almost precisely opposite terms, viz.: If a gift in terms absolute is accompanied by a desire, wish, recommendation, hope, or expression of confidence that the donee will use it in a certain way, no trust to that effect will attach to it, unless on the will, as a whole, the court comes to the conclusion that a trust was intended (*n*). In other words,

(*m*) See cases cited *supra*, and *Malim* v. *Keighley*, 2 Ves. 333, 529; *Knight* v. *Knight*, 3 Beav. 148.

(*n*) See *Re Hanbury*, *Hanbury* v. *Fisher*, [1904] 1 Ch. 415; *Hill* v. *Hill*, [1897] 1 Q. B. 483, at p. 487; *Re Hamilton*, *Trench* v. *Hamilton*, [1895] 2 Ch. 370; *Re Williams*, *Williams* v. *Williams*, [1897] 2 Ch. 12; *Lambe* v. *Eames*, 6 Ch. App. 597; *Re Adams and the Kensington*

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the burden is now on the person who alleges the trust; and precatory words, although to be taken into consideration in deciding whether or no there be a trust, will not suffice unless they are helped by the context.

Authorities for new rule.

As LINDLEY, L.J., observed in *Re Hamilton, Trench* v. *Hamilton* (*o*), "We are bound to see that beneficiaries are not made trustees unless intended to be made so by their testator . . . You must take the will which you have to construe, and see what it means; and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on wills more or less similar to the one which you have to construe." The same view was expressed later by ROMER, J., in *Re Williams, Williams* v. *Williams* (*p*), "The rule you have to observe is simply this: In considering whether a precatory trust attaches to any legacy the court will be simply guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed."

Cases illustrative of the old rule.

As, however, the question has never been finally decided by the House of Lords (although it has been by the Privy Council in *Mussoorie Bank* v. *Raynor* (*q*)), it may be useful to contrast a selection from the older and the more modern cases.

In *Palmer* v. *Simmonds* (*r*), the gift was one of residue to a legatee, his heirs, executors, administrators and assigns for ever, for his own use and benefit, the testator "*having full confidence*" that, if he should die without issue, he would, after providing for his widow for her life, leave the bulk of such residue to persons named. Vice-Chancellor KINDERSLEY expressed an opinion that but for the uncertainty of the subject-matter (the *bulk* of the property) he should have considered himself bound to hold that the legatee took a life estate only, with remainder to his children.

Vestry, 27 Ch. D. 394; *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253; *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321.

(*o*) [1895] 2 Ch. 370; approved in *Re Oldfield, Oldfield* v. *Oldfield*, [1904] 1 Ch. 549.

(*p*) [1897] 2 Ch. 12, at p. 14.

(*q*) 7 App. Cas. 321.

(*r*) 2 Drew. 221.

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This view was followed by the late Vice-Chancellor HALL in *Curnick* v. *Tucker* (*s*). There the testator appointed his wife sole executrix, and left to her all his property for her sole use and benefit, in the full confidence that she would dispose of it amongst all their children during her lifetime and at her decease. The Vice-Chancellor held that the wife took a life interest only, with a power of appointment among the children.

The case of *Gully* v. *Cregoe* (*t*) was even stronger in favour of an absolute gift to the wife, for the gift there was for her own sole use and benefit *for ever*, the testator "feeling assured and having every confidence" that she would dispose of the same equitably amongst her two daughters and their children. Yet the court decided that she took merely a life estate with a power of appointment.

Even so late as 1887, KAY, J., held that where real estate was devised to a lady, accompanied by an expression of the testator's "wish and request" that she should not sell it, she was, during coverture, restrained from anticipation as fully as if a trust to that effect had been declared in imperative terms (*u*).

Even under old rule precatory words were only *primâ facie* imperative.

However, even throughout the older decisions there is a clear consensus of opinion that precatory expressions are only *primâ facie* imperative, and that the inference is capable of being rebutted by the context. Thus, in *McCormick* v. *Grogan* (*v*), C. made a will leaving the whole of his property to G., whom he also appointed his executor. When about to die, C. sent for G., and, in a private interview, told him of the will, and on G.'s asking whether that was right, said he would not have it otherwise. C. then told G. where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great

(*s*) 17 Eq. 320. See also to like effect *Le Marchant* v. *Le Marchant*, 18 Eq. 414, and *Hart* v. *Tribe*, 18 Beav. 215.

(*t*) 24 Beav. 185. See also *Shorelton* v. *Shorelton*, 32 Beav. 143, and *Ware* v. *Mallard*, 16 Jur. 492.

(*u*) *Re Hutchings*, W. N. (1887) 217.

(*v*) L. R. 4 H. L. 82.

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many persons to whom C. wished sums of money to be given, and annuities to be paid, but it contained several expressions as to G. carrying into effect the intentions of the testator as he "might think best," and also this sentence: "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." G. paid the money to some of the persons mentioned in the letter, but not to others, who accordingly sued him; but it was held that the directions were not imperative, and that there was no trust created binding on G. (*w*).

Words of expectation or explanatory of motive.

Again, mere words of expectation or words explanatory of the donor's motives were never held to impose trusts on the donee. Thus, if a legacy was given to a father "the better to enable him to bring up his children," no trust was thereby created; for such words are only explanatory of the donor's motive (*x*). But where, on the other hand, there was a bequest of income to A., "that he may use it for the benefit of himself, and the maintenance and education of his children," it was held that a trust was intended to be imposed upon A. to maintain and educate his children (*y*). It is, however, submitted that, having regard to the manifest tendency of recent decisions against construing such expressions as imperative, no trust would now be created by these words.

(*w*) Apart from the direction not being sufficiently imperative, it would seem that it was void as a trust, under the principle as to testamentary trusts enunciated in Art. 9, *infra*. This case must be carefully distinguished from those where a settlor communicates to persons a disposition which he has formerly made in their favour, but at the same time tells them that he has a purpose to answer, which he has not expressed in the formal instrument, and which he depends upon them to carry into effect, and to which they assent. Such cases are treated of, *post*, under Art. 11.

(*x*) *Brown* v. *Casamajor*, 4 Ves. 498.

(*y*) *Woods* v. *Woods*, 1 M. & C. 401; *Crockett* v. *Crockett*, 2 Ph. 553; and *Talbot* v. *O'Sullivan*, 6 L. R. Ir. 302; and see *Bird* v. *Maybury*, 33 B. 351; *Hora* v. *Hora*, 33 B. 88; *Castle* v. *Castle*, 1 De G. & J. 352.

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Cases illustrative of the modern view.

Let us now contrast the foregoing cases with those in which the more modern view against construing precatory words as imperative has been adopted. The one which, perhaps, marks the turn of the tide is *Lambe* v. *Eames* (*z*). There a testator had given his estate to his widow "to be at her disposal in any way she may think best *for the benefit of herself and family*." It was held that the latter words imposed no trust on the widow in favour of the family, and Lord Justice JAMES commented severely on former decisions which had imposed trusts where none were intended.

This was followed in *Re Hutchinson and Tenant* (*a*), where the testator gave all his property to his widow "absolutely, with full power to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so."

A similar decision was given in *Re Adams and the Kensington Vestry* (*b*). There a testator gave all his estate unto and to the absolute use of his wife, her heirs, executors, administrators and assigns, in full confidence that she would do what was right as to the disposal thereof, between his children, either in her lifetime or by will after her decease. It was held that under these words the widow took an absolute interest in the property, unfettered by any trust in favour of the children. This case (which was decided by the Court of Appeal) virtually overrules the decisions of HALL, V.-C., in *Curnick* v. *Tucker* (*c*), and MALINS, V.-C., in *Le Marchant* v. *Le Marchant* (*d*). In all three cases the precatory words were practically identical, and the only distinction between them is, that in *Re Adams and the Kensington Vestry* the gift to the widow was expressed to be for her "absolute use," whereas in the two other cases it was for her "sole use and benefit." This difference no doubt opens the way for the argument, that due force might be given to the words "sole use and benefit," by construing them as equivalent to "separate use"; whereas no such restrictive meaning can be attached to the

(*z*) 6 Ch. App. 597.
(*a*) 8 Ch. D. 540.
(*b*) 27 Ch. D. 394.
(*c*) 17 Eq. 320.
(*d*) 18 Eq. 414.

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expression "absolute use"; and that consequently *Re Adams and the Kensington Vestry* does not necessarily overrule *Curnick* v. *Tucker* and *Le Marchant* v. *Le Marchant*. It would seem, however, that this distinction is too refined, having regard to the express declaration of the Lords Justices, that the doctrine of precatory trusts was not to be extended.

In *Re Diggles, Gregory* v. *Edmondson* (*e*), a testatrix gave all her property to her daughter, her heirs and assigns, followed by these words: "And it is my desire that she allows to A. G. an annuity of £25 during her life." The daughter and her husband were appointed executors. On these facts, it was held by the Court of Appeal that no trust to pay the annuity was imposed upon the daughter. At first sight this case would appear to overrule the whole doctrine of precatory trusts, but, on reading the judgments of the learned Lords Justices, it will be seen that they carefully gave reasons for their decision, which are not inconsistent with precatory words being still construed as imperative. FRY, L.J., said: "According to the ordinary meaning of the English language this only expresses a desire, and does not import a trust or charge. Moreover, the expression 'that she *allows*' implies a certain amount of discretion in the daughter. Now, consider the inconvenience of what we are asked to decide, that there is a precatory trust affecting the whole property; that the whole property is held in trust to pay £25 a year to Anne Gregory for her life. No fund is directed to be set apart, so if there be a trust it is a trust affecting the whole property. If so, the residuary legatee could not sell a bedstead or give away a ring without committing a breach of trust. . . . The later cases have established the reasonable rule that the court is to consider in each particular case what was the testator's intention. Construing this will according to the ordinary use of the English language, I think that the testatrix did not mean to tie up her whole property during the life of Anne Gregory, but to give it absolutely to her daughter,

(*e*) 39 Ch. D. 253.

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trusting to her affection and honour to make such allowance to Anne Gregory as she mentioned in her will (*f*).

In *Mussoorie Bank* v. *Raynor* (*g*) a testator gave to his widow the whole of his real and personal estate, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." It was held by the Judicial Committee of the Privy Council that the widow took an absolute interest. Sir A. HOBHOUSE said: "Their lordships are of opinion that the current of decisions, now prevalent for many years in the Court of Chancery, shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice JAMES in the case of *Lambe* v. *Eames*, and by Sir GEORGE JESSEL in the case of *Re Hutchinson and Tenant*." It is to be observed, however, that, in spite of this, the judgment was mainly based on the consideration that the subject of the gift was uncertain. "If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the court does not know on what property to lay its hands, but the uncertainty in the subject of the gift *has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words.* In this case nothing is given over to the children of the testator, except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been

(*f*) See also *Mackett* v. *Mackett*, L. R. 14 Eq. 49; *Wilson* v. *Bell*, 4 Ch. App. 581.
(*g*) 7 App. Cas. 321.

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void, not merely because the words of the gift over were precatory only, but it would have been void *notwithstanding that the most direct and precise words* of gift over might be used" (*h*).

In *Re Hamilton, Trench* v. *Hamilton* (*i*) a testatrix gave legacies to two nieces, adding "I wish them to bequeath the same equally between the families of" O. and P. The Court of Appeal held that the gift to the nieces was absolute, and that there was no precatory trust in favour of the families of O. and P.

In *Hill* v. *Hill* (*j*) family diamonds were given to a bride, and a document signed by her contained these words: "When I married, my mother-in-law gave them to me for my life with the request that at my death they might be left as heirlooms." Here, again, the Court of Appeal negatived any trust.

In *Re Williams, Williams* v. *Williams* (*k*) a testator gave all his residuary estate to his wife, her heirs, executors, administrators, and assigns absolutely "in the fullest trust and confidence that she will carry out my wishes" in particulars which the testator set forth. It was held by ROMER, J., that there was no trust imposed in the wife.

The latest decision is that of the Court of Appeal in *Re Hanbury, Hanbury* v. *Fisher* (*l*). There the testator gave all his property to his wife "absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit. And in default of any disposition by her thereof by her will or testament, *I hereby direct* that all my estate and property acquired by her under this my will shall at her death be divided among the surviving said nieces." In spite of these very strong

This reversed on appeal.

(*h*) See also *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Bond, Cole* v. *Hawes*, 4 Ch. D. 238; where the words were rather more imperative, but the decision was the same.

(*i*) [1895] 2 Ch. 370. This case overruled *Malim* v. *Keighley*, 2 Ves. jun. 333, 529, and is not inconsistent with *Knight* v. *Boughton*, 11 Cl. & F. 548, *per* C.A., *Re Oldfield, Oldfield* v. *Oldfield*, [1904] 1 Ch. 549.

(*j*) [1897] 1 Q. B. 483.

(*k*) [1897] 2 Ch. 12.

(*l*) [1904] 1 Ch. 415.

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words the court negatived any trust, Lord Justice VAUGHAN WILLIAMS saying that *he assumed* that, having regard to recent decisions, the words "*in full confidence*" did not constitute a trust in favour of the nieces, and that that being so, the words from "in default of any disposition" down to the end of the gift imposed a condition which was repugnant to the previous absolute gift and void. Lord Justice STIRLING was of the same opinion; but Lord Justice COZENS-HARDY dissented, thinking that on the true construction of the will the widow took only a life interest. See 1905 A. C. 8

It may perhaps be humbly observed that the assumption of Lord Justice WILLIAMS, that recent decisions show that the words "in full confidence" do not create a trust, is somewhat too wide. It is submitted that there is no such rule, and that whilst other parts of the will may show that such words were not used imperatively, yet an expression of confidence (as distinguished from a mere hope or prayer), if it stood alone, would be somewhat cogent evidence of an intention to impose a trust. In the case in question the previous gift to the wife "absolutely" was no doubt of considerable weight as tending to negative an imperative interpretation being given to the expression of confidence; but the final gift over in default of appointment would certainly seem to be quite inconsistent with the theory that the testator used the word "absolutely" in its strict sense. However ambiguous his language, it is difficult to resist the inference (reading the will as a whole) that his intention was to restrict his widow to a life estate with a power of appointment among the nieces (*m*). It is with humility suggested that to give too unbending an interpretation to the word "absolutely" is as likely to disappoint the intentions of testators as would be the case if a strict interpretation were given to any other single word irrespective of other expressions in the will of an inconsistent character.

(*m*) See *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438; but *cf. Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939.

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ART. 7.—*Of Illusory Trusts.*

Persons to whom payments are directed to be made by trustees are not beneficiaries, and cannot enforce such directions if the object of the settlor, as gathered from the whole settlement, appears to have been to create a trust merely for his own convenience and not for their benefit.

Creditor's trust deeds.

Thus, where a person who is indebted, makes provision for payment of his debts generally, by vesting property in trustees upon trust to pay them, but does so behind the backs of the creditors and without communicating with them, the trustees do not necessarily become trustees for the creditors. "The motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the court has therefore to examine into the circumstances for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself" (*n*).

Inferences arising with regard to creditors' deeds.

Primâ facie a trust deed for payment of the settlor's creditors *generally*, is deemed to have been made for the debtor's convenience. It is as if he had put a sum of money into the hands of an agent with directions to apply it in paying certain debts, and such a trust is revocable, the debtor being, in fact, the sole beneficiary (*o*). But on the other hand, where the creditors are parties to the arrangement, the inference then is, that the deed was intended to create a trust *in their* favour, which they are entitled to call on

(*n*) *Per* TURNER, V.-C., *Smith* v. *Hurst*, 10 Hare, 30.

(*o*) *Walwyn* v. *Coutts*, 3 Sim. 14; *Garrard* v. *Lauderdale*, 3 Sim. 1: affirmed, 2 R. & M. 451; *Acton* v. *Woodgate*, 2 My. & K. 495; *Bill* v. *Cureton*, *ib.* 511; *Gibbs* v. *Glamis*, 11 Sim. 584; *Henriquez* v. *Bensusan*, 20 W. R. 350; *Johns* v. *James*, 8 Ch. D. 744; *Henderson* v. *Rothschild*, 33 Ch. D. 459. But see *Re Fitzgerald's Settlement*, *Fitzgerald* v. *White*, 37 Ch. D. 18, and *Priestley* v. *Ellis*, [1897] 1 Ch. 489, deciding contra as to trusts for creditors after settlor's death.

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the trustee to execute (*p*). And so, even though they be not made parties, yet if the debtor has given them notice of the existence of the deed, and has expressly or impliedly told them that they may look to the trust property for payment, they may become *cestuis que* trusts (*q*) (1) if they have been thereby induced to exercise forbearance in respect of their claims (*r*), or (2) if they have assented to the deed and actively (and not merely passively) acquiesced in it, or (3) have acted under its provisions and complied with its terms, and the other side has expressed no dissatisfaction; but not otherwise (*s*). Moreover, where the trust is for particular named creditors (at all events where the facts show that the object of the settlor was to give them a preference over the general body of his creditors) (*t*), the inference is that they were intended to be benefited; and a similar inference arises where the deed provides for payment of the settlor's debts *at his death* with remainders over (*u*). And where it provides for such payment *either* in the settlor's lifetime *or* after his death, it can (it would seem) be enforced by the creditors unless he revokes it in his lifetime (*x*).

Direction to trustees to pay costs, etc.

So, where trustees are, by the settlement, directed to pay all costs, charges and expenses of the deed, and other incidental charges and expenses of the trust, and to reimburse themselves, and then to pay over the residue to third parties, the solicitor who prepared the deed, and acted as solicitor to the trustees, is not a beneficiary. The trust might of course be enforced, but not by him (*y*).

(*p*) *Mackinnon* v. *Stewart*, 1 Sim. (N.S.) 76; *La Touche* v. *Earl of Lucan*, 7 Cl. & F. 772; *Montefiore* v. *Browne*, 7 H. L. Cas. 241; and see *Smith* v. *Cooke*, [1891] A. C. 297.

(*q*) Lord Cranworth in *Synnot* v. *Simpson*, 5 H. L. Cas. 241.

(*r*) *Per* Sir John Leach in *Acton* v. *Woodgate*, *supra*.

(*s*) *Per* Lord St. Leonards in *Field* v. *Donoughmore*, 1 Dr. & War. 227; see also *Nicholson* v. *Tutin*, 2 K. & J. 18; *Kirwan* v. *Daniel*, 5 Hare, 493; *Griffith* v. *Ricketts*, 7 Hare, 299; *Cornthwaite* v. *Frith*, 4 De G. & S. 552; *Siggers* v. *Evans*, 5 El. & Bl. 367; *Gould* v. *Robertson*, 4 De G. & S. 509; *Re Ashby*, [1892] 1 Q. B. 872.

(*t*) *New*, *etc. Trustee* v. *Hunting*, [1897] 2 Q. B. 19.

(*u*) See *per* Lord Cranworth in *Synnot* v. *Simpson*, 5 H. L. Cas. 121.

(*x*) *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

(*y*) *Worrall* v. *Harford*, 8 Ves. 4; *Foster* v. *Elsley*, 19 Ch. D. 518. See also *Strickland* v. *Symons*, 26 Ch. D. 245; and *Staniar* v. *Evans*, 34 Ch. D. 470, negativing the right of a creditor of trustees to proceed against the *estate*.

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Direction to employ and pay a named person.

Even a positive direction to the trustees of a will to employ a particular person and to allow him a salary, does not create a trust in his favour (*z*). Thus, a direction in a will appointing a particular person solicitor to the trust estate, imposes no trust or duty on the trustees of the will to employ and pay him (*a*).

Funds confided to State officials for distribution.

The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State (who receive them from the Treasury) in favour of private persons (*b*). And on similar grounds, where her late Majesty, by royal warrant, granted booty of war to the Secretary of State for India *in trust* to distribute amongst the persons found entitled to share in it by the Court of Admiralty, it was held that the warrant did not operate as a declaration of trust in favour of such persons, but merely made the Secretary of State the *agent of the Sovereign* for the purpose of distributing the fund (*c*).

ART. 8.—*How far Valuable Consideration is necessary to bind Settlor or his Representatives.*

(1) The court will enforce a voluntary trust, against the settlor or his representatives, if—

(a) it is created by will; *or*,

(b) the settlor has done all in his power to transfer the trust property to a trustee; *or*, has constituted himself a trustee for the purposes of the trust (*d*).

(*z*) *Shaw* v. *Lawless*, 5 Cl. & F. 129.

(*a*) *Foster* v. *Elsley*, 19 Ch. D. 518; *Finden* v. *Stephens*, 2 Ph. 142. Nevertheless it has been held that where a professional person is appointed a trustee of a will and authorised to act in a professional capacity to the trust and to charge professional fees, he is in effect a legatee and cannot charge where the estate is insolvent (*Re White*, *Pennell* v. *Franklin*, [1898] 2 Ch. 217; *Re Barber*, *Burgess* v. *Vinnicome*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1; *Re Thorley*, *Thorley* v. *Massam*, [1891] 2 Ch. 613).

(*b*) *Greenville-Murray* v. *Clarendon* (*Earl*), 9 Eq. 11.

(*c*) *Kinloch* v. *Secretary of State for India*, 15 Ch. D. 1; 7 App. Cas. 619.

(*d*) *Ellison* v. *Ellison*, 2 Wh. & Tu. 835; *Milroy* v. *Lord*, 4 De G. F. & J. 264; *Richards* v. *Delbridge*, 18 Eq. 11; *Ex parte Pye*, 18 Ves. 140; *Dipple* v. *Corles*, 11 Hare, 183; *Antrobus* v. *Smith*, 12 Ves.

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(2) An instrument intended to operate as an assignment, but invalid as such (and *a fortiori* a voluntary covenant), will not be construed as equivalent to a declaration of trust by the settlor in favour of the intended assignee or the covenantee (*e*).

(3) Even where valuable consideration has been given for an *incomplete* trust, it will only be enforced at the suit of some person privy to that consideration (*f*). But if enforced at all, it will be enforced in favour of all the beneficiaries, and not merely of the plaintiff.

(4) Persons privy to valuable consideration comprise—

(a) the person by whom, or at whose request, it is given (*g*);

(b) the husband, wife and children of a marriage, which is itself the consideration (*h*);

(c) trustees for any of the foregoing (*i*).

Persons not falling within any of these classes are called volunteers.

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Attitude of equity towards volunteers.

It is a well-known maxim, that equity gives no assistance to volunteers; but, like many other epigrammatic

39; *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 222; *Re Austis, Chetwynd* v. *Morgan*, 31 Ch. D. 596; *Green* v. *Paterson*, 32 Ch. D. 95; *Re Richards, Shenstone* v. *Brock*, 36 Ch. D. 541; *Harding* v. *Harding*, 17 Q. B. D. 442.

(*e*) *Milroy* v. *Lord*, *supra*. But nevertheless, where a voluntary settlor has entered into a covenant for title under seal, the grantees will at law be entitled to recover *damages* for breach of the covenant (*Re Ford, Gilbert* v. *Gilbert*, 63 L. T. 557). And see also *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch., at p. 88.

(*f*) Cases cited in note (*d*), and *Gale* v. *Gale*, 6 Ch. D. 144; *Colyear* v. *Lady Mulgrave*, 2 Kee. 81; *Davenport* v. *Bishopp*, 2 Y. & C. 451; *Tasker* v. *Small*, 3 My. & Cr. 69.

(*g*) See *per* Wilde, C.J., *Blandy* v. *De Burgh*, 6 C. B. 634; *Tweddle* v. *Atkinson*, 1 B. & S. 393.

(*h*) See *Osgood* v. *Strode*, 2 P. W. 245; *Gale* v. *Gale*, *supra*.

(*i*) See *per* Lindley, L.J., *Re Austis, Chetwynd* v. *Morgan*, 31 Ch. D. 596, 636.

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expressions, it cannot be accepted literally. The true rule is, that equity will give no assistance to volunteers for the purpose of enforcing an *inchoate intention* to confer a bounty, or, in other words, equity will not enforce a voluntary executory trust. But where a trust has once been completely declared (or, in technical language, is an executed trust), courts of equity will enforce it, whether the party applying for relief gave valuable consideration or not; even although the trustee should disclaim the trust and thereby revest the property in the settlor (*k*). As KAY, J., said, in *Henry* v. *Armstrong* (*l*), "The law is, that anybody of full age and sound mind, who has executed a voluntary deed by which he has *denuded himself of his own property*, is bound by his own act." And the same result follows if he has declared himself, or afforded clear evidence that he considered himself, a trustee of it *in præsenti*; for a declaration of trust is the equitable equivalent of a common law gift.

Part vested in trustees and part agreed to be conveyed to them.

Thus, in *Jeffries* v. *Jeffries* (*m*), a father voluntarily conveyed freeholds to trustees upon certain trusts in favour of his daughters; and also covenanted to surrender copyholds to the use of the trustees, to be held by them upon the trusts of the settlement. The settlor afterwards died without surrendering the copyholds, having devised certain portions of both freeholds and copyholds to his wife. In a suit by the daughters to have the settlement enforced, it was held, that the court would carry out the settlement of the freeholds; for with respect to them the trust was executed, the title of the daughters complete, and the property actually transferred to the trustees. On the other hand, it refused to decree a surrender of the copyholds; for with respect to them, the trust was purely executory, the settlor having neither declared himself a trustee, nor transferred the copyholds to the trustees. He had merely entered into a voluntary contract to transfer them, which, being a *nudum pactum*, was of no greater validity in equity than at law (*m*).

(*k*) *Mallett* v. *Wilson*, [1903] 2 Ch. 494. (*l*) 18 Ch. D. 668.
(*m*) *Jeffries* v. *Jeffries*, Cr. & Ph. 138; and see also *Bizzey* v. *Flight*, 3 Ch. D. 269; 24 W. R. 957, read in conjunction with the remarks of LINDLEY, L.J., in *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82; and see *Marler* v. *Tommas*, 17 Eq. 8.

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Executed trust cannot be broken.

By a marriage settlement, the wife's property was settled (after life estates to the husband and wife), in default of children, in trust for the wife if she should survive the husband; but in the event of the husband surviving the wife, then upon such trusts as the wife should *by will* appoint, and, in default of appointment, in trust for her next of kin. There being no issue of the marriage, and the wife being past the age of child-bearing, the husband and wife sought to have the capital of the trust fund paid to them; on the ground that, although the trust was based on value, the next of kin were mere volunteers. The Court of Appeal, however, refused to permit this, Jessel, M.R., saying: "The fund has been transferred to the trustees. The fact of the next of kin being volunteers, does not enable the trustees to part with it without the consent of their *cestuis que* trusts. That has been the rule ever since the Court of Chancery existed." And Cotton, L.J., added: "I assume that this trust would not have been enforced *if it were still executory*. But this trust is *executed*, and the next of kin have an interest as *cestuis que* trusts. It is immaterial that they are volunteers. The trust cannot be broken on that account" (*n*).

Voluntary transmutation of equitable interests.

Where, however, the settlor has himself only an equitable interest, it is not essential to the validity of a voluntary settlement by him that he should procure the transfer of the legal ownership to the trustees. Thus, in *Gilbert* v. *Overton* (*o*), A., having an agreement for a lease, executed a voluntary settlement assigning all his interest in the agreement to trustees upon certain trusts. It was objected that he had not declared himself a trustee, nor intended to declare himself one, and had not conveyed the leasehold premises to the trustees. Wood, V.-C., however, said: "In the inception of this transaction, there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so, after the execution of the settlement. There is, therefore, nothing to show that the settlor did not, by the settlement, *do all that it was in his power to do to pass the property*."

(*n*) *Paul* v. *Paul*, 20 Ch. D. 742. (*o*) 2 H. & M. 110.

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So, in *Kekewich* v. *Manning* (*p*), residuary personal estate was bequeathed to a mother for life, with remainder to her daughter absolutely. The daughter assigned all her interest under the will to trustees upon trusts (which were voluntary) in favour of her nieces. These trusts were upheld on the ground that the daughter had done all she could to divest herself of her interest under the will. For she had a mere equitable remainder, and the only way in which she could transfer it was by assignment. If she had been the legal owner of the fund it would have been necessary for her to transfer it in the proper way in the books of the bank; but not being the legal owner, she did all she could do to transfer it (*q*). The result would, it is conceived, have been the same, even if the daughter had been entitled in possession instead of in remainder (*r*), notwithstanding that in such a case she could have called on *her* trustees to assign the legal ownership to the trustees of the voluntary settlement.

So, again, where one effects a policy on his life, under the terms of which the money is to be paid to his children unless he shall otherwise appoint by will, the children obtain complete equitable rights subject to be defeated by the exercise of the power; for there is nothing more to be done by *the settlor* (*s*).

Debts assigned, but subsequently got in by settlor.

In *Bizzey* v. *Flight* (*t*), A. (*inter alia*) assigned certain mortgage debts to trustees upon certain trusts. The settlement, however, contained no transfer of the mortgage

(*p*) 1 De G. M. & G. 176.

(*q*) The chief difficulty is to determine what *is* a complete assignment and what is not. See *Donaldson* v. *Donaldson*, Kay, 711; *Edwards* v. *Jones*, 1 My. & Cr. 226; *Pearson* v. *Amicable Assurance Co.*, 27 Beav. 229; *Fortescue* v. *Barnett*, 3 My. & K. 36; *Re King, Sewell* v. *King*, 14 Ch. D. 179; *Harding* v. *Harding*, 17 Q. B. D. 442; *Nanney* v. *Morgan*, 37 Ch. D. 346 (equitable interest in shares); and *Re Earl of Lucan, Hardinge* v. *Cobden*, 45 Ch. D. 470.

(*r*) See *Nanney* v. *Morgan*, *supra*; *Gason* v. *Rich*, 19 L. R. Ir. 391; *Bentley* v. *Mackay*, 15 Beav. 12; *Tierney* v. *Wood*, 19 *ib.* 330; *Re Walkampton*, 26 Ch. D. 391; and *per* WOOD, V.-C., *Gilbert* v. *Overton*, 2 H. & M. 117; but *cf. Bridge* v. *Bridge*, 16 Beav. 315.

(*s*) *Re Davies, Davies* v. *Davies*, [1892] 3 Ch. 63; and see also *Re Flavell, Murray* v. *Flavell*, 25 Ch. D. 89; *Wilson* v. *Bury*, 5 Q. B. D. 18; and *Ashby* v. *Costin*, 21 *ib.* 401.

(*t*) 24 W. R. 957. *Quære* whether, if the settlement had been made since the Judicature Acts, the omission to give notice to the debtor would not have been fatal.

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securities. A. subsequently received the money due on some of the mortgages, the trustees receiving the money due on others. It was held by Hall, V.-C., that as the mortgaged property was not transferred to the trustees, the settlement was essentially incomplete, and, being a voluntary settlement, was void. In a more recent case before the Court of Appeal, however (*u*), in which the only difference was that the mortgage was a bill of sale of chattels, the court held that the settlement was complete and binding, and threw some doubt on the correctness of the decision in *Bizzey* v. *Flight*. It appears, however, that their lordships distinguished the two cases on the ground that a bill of sale was different to a mortgage of land, in which a transferee of the debt would be unable to give a receipt for the money unless he could re-convey the mortgaged property, whereas on payment of a bill of sale, no re-assignment of the mortgaged chattels is required.

Declaration of trust implied from conduct.

With regard to acts showing that a person has constituted himself a trustee, although there is no actual declaration of trust, the case of *Gee* v. *Liddell* (*v*) may be referred to. There a testator bequeathed £2,000 on certain trusts, and empowered his executor (who was also his residuary legatee) to retain the amount in his hands uninvested, paying interest thereon at four per cent. per annum. After the testator's death, the executor, being satisfied that the testator intended to bequeath £3,000, and not £2,000, said to the legatee's father: "It shall make no difference, and I will take care that he (the legatee) shall have £1,000 more than he is entitled to by the will." Subsequently he signed a memorandum in these words: "By the will, etc., of the late S. G. the said J. G. (the executor) pays to T. W. (the legatee), the annual sum of £120 by two equal payments, viz., the 6th July and the 6th January in each year, being interest at four per cent. on £3,000." He also signed a further memorandum, stating that he had told the legatee that he should make the £2,000 up to £3,000; *and down to*

(*u*) *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82.

(*v*) 35 Beav. 621; and see also *New, etc. Trustee* v. *Hunting*, [1897] 2 Q. B. 19; *Thorpe* v. *Owen*, 5 Beav. 224; *Armstrong* v. *Timperon*, W. N. (1871), p. 4; *Ex parte Dubost*, 18 Ves. 140 (otherwise *Ex parte Pye*); and *Re Bellasis' Trusts*, 12 Eq. 218.

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his death he in fact paid interest on the £3,000. On these facts, it was held that the executor had effectually constituted himself a trustee of an additional £1,000 of the residuary estate.

PARAGRAPH (2).

Imperfect gift not construed as declaration of trust.

On the other hand, although some judges have held that an instrument executed as a present assignment (but in reality not operative as such) is equivalent to a declaration of trust (*w*), the balance of authority is unmistakeably the other way. For an intention to create a trust is essential to the creation of one, and when a man purports to make a gift or an assignment, he cannot reasonably be supposed to have intended to declare himself a trustee—a character which assumes that he *retains* the property (*x*).

Thus, in *Antrobus* v. *Smith* (*y*), the alleged settlor made the following endorsement on a share held by him in a public company: "I do hereby *assign* to my daughter B. all my right, title, and interest of and in the enclosed call, and all other calls, in the F. and C. Navigation." The endorsement did not operate as a valid *assignment* of the share; but it was contended that it operated as a valid declaration of trust. The court, however, rejected this view, the Master of the Rolls saying: "Mr. Crawfurd (the alleged settlor) was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. . . . He meant a gift, and there is no case in which a party has been compelled to perfect a gift which in the mode of making it he has left imperfect."

(*w*) *Richardson* v. *Richardson*, 3 Eq. 686, WOOD, V.-C. (afterwards Lord HATHERLEY); *Morgan* v. *Malleson*, 10 Eq. 475, Lord ROMILLY; *Baddeley* v. *Baddeley*, 9 Ch. D. 113, MALINS, V.-C.

(*x*) BACON, V.-C., in *Warriner* v. *Rogers*, 16 Eq. 340, Sir GEORGE JESSEL, M.R., in *Richards* v. *Delbridge*, 18 Eq. 11, and HALL, V.-C., in *Re Breton's Estate*, *Breton* v. *Woolfren*, 17 Ch. D. 416. See also *Jones* v. *Lock*, 1 Ch. App. 25; *Heartley* v. *Nicholson*, 19 Eq. 233; *Re Shield*, *Pethybridge* v. *Burrow*, 53 L. T. 5, and it is submitted that, both on principle and authority, the law as laid down by the Master of the Rolls in *Richards* v. *Delbridge*, is accurate.

(*y*) 12 Ves. 39. Shares or stocks must be transferred according to the company's regulations (*Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Roots* v. *Williamson*, 38 Ch. D. 485; *Mutual Provident Land and Building Society* v. *Macmillan*, 14 App. Cas. 596).

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Again, a settlor had children by a first wife, and one son (an infant) by a second wife. One day on his return from a journey, the infant's nurse said, "You have come back from Birmingham, and have not brought baby anything"; upon which the settlor answered, "Oh! I gave him a pair of boots, and now I will give him a handsome present." He then went upstairs and brought down a cheque which he had received for £900, and said, "Look you here, I *give* this to baby; it is for himself; I am going to put it away for him, and will give him a great deal more with it; it is his own, and he may do what he likes with it." He then put the cheque away. A few days after the above took place, he suddenly died, leaving the child penniless. The legal right to the cheque could, of course, only pass by indorsement (and no indorsement had been made). It was held that there was nothing more than an inchoate intention to do whatever was necessary to invest the proceeds of the cheque for the child's benefit, and that the father having died before he had carried out his intention, a court of equity could give no aid to the child (*z*).

So in *Milroy* v. *Lord* (*a*), Turner, L.J., laid it down that, "in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. But in order to render the settlement binding, one or other of these modes must (as I understand the law of this court) be resorted to,

(*z*) *Jones* v. *Lock*, 1 Ch. App. 25; and see also *Re Shield*, *Pethybridge* v. *Burrow*, 53 L. T. 5, and *Marler* v. *Tommas*, 17 Eq. 8 (which seem to be inconsistent with *Re King*, *Sewell* v. *King*, 14 Ch. D. 179, the authority of which is respectfully questioned), and *Vincent* v. *Vincent*, 35 W. R. 7, and *Re Smith*, *Champ* v. *Marshallsay*, 64 L. T. 13; and see, as to imperfect gifts at common law, *Irons* v. *Smallpiece*, 2 B. & Ald. 551; and *Cochrane* v. *Moore*, 25 Q. B. D. 57.

(*a*) 4 De G. F. & J. 264.

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for there is no equity in this court to perfect an imperfect gift.

It was at one time thought that there was an exception (or a seeming exception) to this principle in the case of husband and wife (*b*); but the decision of the late Vice-Chancellor HALL, *contra*, in *Re Breton's Estate, Breton* v. *Woollven* (*c*), has thrown considerable doubt on the soundness of that view. The point is, however, no longer of importance as, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), gifts made by a husband to a wife are as valid as gifts made by one stranger to another.

PARAGRAPHS (3) AND (4).

Party cannot enforce trusts based on value unless privy to the consideration.

With regard to incomplete or executory trusts based on valuable consideration, equity will enforce them only at the suit of a person *privy to that consideration*, and not at the suit of a mere volunteer, even although he be made party to the trust instrument (*e.g.*, to a contract for a settlement) (*d*). On the other hand, when a person who is privy to the consideration, seeks to enforce an executory trust, the court will enforce it *in toto*, that is to say, not only in his favour, but in favour of all parties, volunteers included (*e*).

An excellent example of the rule that an executory trust, although founded on valuable consideration, cannot be enforced by a volunteer, is afforded by the case of *Colyear* v. *Lady Mulgrave* (*f*). There, a father, who had four natural daughters and a legitimate son, entered into an agreement *with the son*, whereby the father covenanted to transfer the sum of £20,000 to a trustee for the benefit of the four daughters; and the son covenanted to pay the father's debts. The son paid some of the debts, and died before the covenant by the father was performed, having by his will left the father

(*b*) *Grant* v. *Grant*, 34 Beav. 623; followed by MALINS, V.-C., in *Baddeley* v. *Baddeley*, 9 Ch. D. 113, and by BACON, V.-C., in *Fox* v. *Hawks*, 13 Ch. D. 822.

(*c*) 17 Ch. D. 416.

(*d*) *Drew* v. *Marten*, 2 H. & M., at p. 133; Fry, Spec. Perf. sect. 92; *Twaddle* v. *Atkinson*, 30 L. J. Q. B. 265; Chitty on Contracts (ed. 1881), p. 54.

(*e*) *Davenport* v. *Bishopp*, 2 Y. & C. C. 451, affirmed 1 Ph. 698; and see *Lloyds* v. *Harper*, 16 Ch. D. 311.

(*f*) 2 Keen, 81.

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his sole legatee and executor. It was held, that the daughters could not force the father to perform the covenant to settle £20,000 upon them, as, although the son gave value for the father's covenant, the daughters were not privy to that consideration.

So a covenant to settle future-acquired property contained in a marriage settlement (*i.e.*, a settlement based on the valuable consideration of marriage), although, of course, enforceable by any person who is privy to the consideration (*e.g.*, the husband, wife, children or trustees), cannot be enforced by parties who are not so privy, *e.g.*, by the wife's next of kin taking under an express trust in default of issue (*g*).

On similar principles, where an expectancy is ostensibly assigned to trustees, no volunteer can enforce the trust against the assignor. For an assignment of an expectancy is merely a *contract to assign it* if and when it falls in (*h*).

Who are privy to consideration of marriage.

At one time, however, it was thought that the children of a widow, who, on a second marriage, made or procured a settlement in their favour, became privy to the valuable consideration of the marriage, and could enforce the performance of a covenant or an incompleted trust (*i*). Moreover, in *Clarke* v. *Wright* (*j*), some of the judges in the Exchequer Chamber went so far as to extend the marriage consideration to all relatives of an intended wife, and even to the relatives of an intended husband where *he* was not the settlor, on the ground that a benefit to these relatives must have formed part of the marriage bargain. It is difficult to see, however, how these persons could have been privy to the consideration, although the bargain between husband and wife was a bargain founded on value; and by a more recent decision of the Privy Council (*k*), *Clarke* v. *Wright* was expressly overruled.

(*g*) *Green* v. *Paterson*, 32 Ch. D. 95; *Re Austis*, *Chetwynd* v. *Morgan*, 31 *ib.* 596.
(*h*) *Re Ellenborough*, *Towry-Law* v. *Burne*, [1903] 1 Ch. 697.
(*i*) *Gale* v. *Gale*, 6 Ch. D. 144.
(*j*) 6 H. & N. 849.
(*k*) *De Mestre* v. *West*, [1891] A. C. 264; and see also *Mackie* v. *Herbertson*, 9 App. Cas. 303, 337; *Re Cameron and Wells*, 37 Ch. D. 32; and *Att.-Gen.* v. *Jacobs-Smith*, [1895] 2 Q. B. 341, where such a limitation was held to be voluntary for purposes of account duty.

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Distinction where the volunteer also stands in the shoes of the settlor.

The above cases must, however, be carefully distinguished from those where the volunteer is not seeking to enforce the covenant *against the covenantor*, but to enforce the trust in his favour against the trustees, where the covenantor has performed the covenant. Such cases were elaborately discussed in *Re Flavell*, *Murray* v. *Flavell* (*l*), where it was held that a provision in a partnership deed that a certain annuity should be paid by the surviving partner to the widow of the deceased, was a valid trust; and that as the widow was able *as personal representative of the deceased* to enforce the covenant against the partner, she was entitled when she received the annuity from him to keep it for herself as beneficiary under the trust. She had not in fact to seek the assistance of a court of equity *against the settlor or his representatives.*

ART. 9.—*What Property is capable of being made the Subject of a Trust.*

All property, real or personal, legal or equitable, at home or abroad, and whether in possession or action, remainder, reversion, or expectancy, may be made the subject of a trust, unless—

(a) the policy of the law or any statutory enactment prohibits the settlor from parting with the beneficial interest in it; or,

(b) being real estate, the tenure under which it is holden, is inconsistent with the trust sought to be created (*m*).

(*l*) 25 Ch. D. 89; and see also *Re Davies*, *Davies* v. *Davies*, [1892] 3 Ch. 63; *Wilson* v. *Bury*, 5 Q. B. D. 518; and *Ashby* v. *Costin*, 21 *ib.* 401.

(*m*) See *Nelson* v. *Bridport*, 8 Beav. 574; and *Allen* v. *Bensey*, 7 Ch. D. 453.

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Sub-Paragraph (a).

Equitable interests.

A person, holding an agreement for a lease, assigned all his interest under it to trustees upon certain trusts. Here, although the legal term was not in the settlor, it was held to be a good settlement, because he had conveyed his equitable interest in the property (*n*).

Choses in action.

A. owes £1,000 to B. B. assigns this debt to trustees upon certain trusts. This transaction is perfectly good. Prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66), debts and other legal choses in action were not assignable at law, on the ground (as put by Lord Coke), that it "would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice" (10 Co. 48). But even at law negotiable instruments (as debentures, bills of exchange, and promissory notes made negotiable) were exceptions to the rule; and so were all contracts where a novation took place, that is to say, where both parties to the original contract assented to the transfer of the interest of one of them. Equity, however, almost always, from its earliest days, disregarded the legal doctrine, and freely enforced contracts for the sale of choses in action; and now, by 8 & 9 Vict. c. 106, s. 6, contingent and future interests and possibilities, *coupled with an interest in real estate*, may be granted or assigned at law. But not so possibilities in personal estate which still remain only assignable in equity (*o*). By 30 & 31 Vict. c. 144, policies of life assurance may be legally assigned, and by 31 & 32 Vict. c. 86, a similar relaxation of the law was introduced in favour of marine policies; and finally, by s. 6 of the Judicature Act, 1873, debts and other legal choses in action may be assigned at law, where the assignment is absolute and not by way of charge only.

(*n*) *Gilbert* v. *Overton*, 2 H. & M. 110; and see also *Knight* v. *Bowyer*, 23 Beav. 609.

(*o*) See *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Collyr* v. *Isaacs*, 19 Ch. D. 342; and *Re Ellenborough*, *Towry-Law* v. *Burne*, [1903] 1 Ch. 697.

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Reversionary interests.

Again, A. settled upon his wife and children real estate to which, under the will of his uncle, he was entitled in reversion. Held good (*p*).

Expectancies.

With regard to mere possibilities and expectancies in personal estate, it must be borne in mind that although assignable in equity (*q*), the assignment only operates as a contract to assign when the expectancy becomes a reality. If and when that happens the assignment operates in equity. But if during the intervening period the so-called assignee becomes bankrupt, then, as the bankruptcy puts an end to all his contracts, the *quasi* assignment fails (*r*).

Property inalienable by reason of public policy.

Salaries or pensions given for enabling persons to perform duties connected with the public service, or to enable them to be in a fit state of preparation to perform those duties, are inalienable; but otherwise not. In *Grenfell* v. *Dean and Canons of Windsor* (*s*), a canon of Windsor had assigned the canonry and the profits to the plaintiff to secure a sum of money. There was no cure of souls, and the only duties were residence within the castle and attendance in the chapel for twenty-one days a year. In giving judgment for the plaintiff and upholding the assignment, the Master of the Rolls said: "If he (the canon) had made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned in which it may be against public policy that the income arising from the performance of those duties should be assigned; and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the

(*p*) *Shafto* v. *Adams*, 4 Giff. 492

(*q*) *Wethered* v. *Wethered*, 2 Sim. 183; and see also *Beckley* v. *Newland*, 2 P. W. 182; *Harwood* v. *Tooke*, 2 Sim. 192; *Higgins* v. *Hill*, 56 L. T. 426; *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Re Clarke*, *Coombe* v. *Carter*, 36 Ch. D. 348; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Morgan* v. *Hardy*, *ib.* 354; and *Thomas* v. *Kelly*, *ib.* 506.

(*r*) *Collyer* v. *Isaacs*, 19 Ch. D. 342; and *cf. Re Ellenborough*, *Towry-Law* v. *Burne*, *supra*.

(*s*) 2 Beav. 554.

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cases of half-pay, where there is a sort of retainer, and where the payments which are made to officers from time to time are the means by which they—being liable to be called into public service—are enabled to keep themselves in a state of preparation for performing their duties."

So, in *Davis* v. *Duke of Marlborough* (*t*), the Lord Chancellor said: "A pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable." The emoluments of ecclesiastical livings were expressly made inalienable by 13 Eliz. c. 20, and 57 Geo. 3, c. 99.

Property inalienable by statute.

Some classes of property are expressly made inalienable by statute. Thus, in *Davis* v. *Duke of Marlborough* (*t*), a pension was granted by statute to the duke and his successors in the title "for the more honourable support of the dignities." It was held, that the object of parliament being that "it should be kept in mind that it was for a memento and a perpetual memorial of national gratitude for public services," it was inalienable.

Pay, pensions, etc., of military and naval officers.

Pay, pensions, relief, or allowance payable to any officer of his Majesty's forces, or to his widow, or to any person on the compassionate list, are also made unassignable by statute (*u*). So also are the pay of seamen in the navy (*v*), and half-pay in the marine forces (*x*); but it would seem that the right to pay actually due at the date of the assignment is assignable (*y*). Salaries or pensions, not given in respect of public services, are freely assignable (*z*).

Paragraph (2).

Trust inconsistent with tenure.

Where, with respect to copyhold lands, there is no custom to create an estate tail in the manor of which they are

(*t*) 1 Sw. 74.
(*u*) 47 Geo. 3, sess. 2, c. 25, ss. 1—14.
(*v*) 1 Geo. 2, c. 14, s. 7.
(*x*) 11 Geo. 4 & 1 Will. 4, c. 20, s. 47.
(*y*) 11 Geo. 4 & 1 Will. 4, c. 20, s. 54.
(*z*) *Feistel* v. *King's College*, 10 Beav. 491; and for other cases bearing on assignments of salaries and pensions, see *Stone* v. *Lidderdale*, 2 Anst. 533; *Arbuthnot* v. *Norton*, 5 Moo. P. C. C. 219; *Carew* v. *Cooper*, 10 Jur. (N.S.) 429; *Alexander* v. *Duke of Wellington*, 2 Russ. & M. 35.

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holden, an equitable estate tail cannot be created by way of trust: for that would be inconsistent with the tenure (in other words, with the conditions) under which the lands are holden (*a*). But, on the other hand, where a trust is not inconsistent with the custom of a manor, it will be valid, although legal estates to the same extent could not be created (*b*).

Trusts of foreign land.

The same principle holds in the case of lands situated abroad; even if such lands are capable of being settled by way of special trust at all, a point which is not free from doubt (*c*). As to the validity of English trusts of personal estate created by English women about to marry (and therefore to become) foreigners, and which are void according to the law of matrimonial domicile, the reader is referred to the next article.

ART 10.—*The Legality of the Expressed Object of the Trust.*

(1) A trust created for a purpose illegal by English law is void (*d*). Such trusts mostly fall under one of the following classes:

(a) trusts for the accumulation (*e*), or the tying up of property for an unlawful period;

(b) trusts providing for the continued enjoyment of the trust property by an insolvent beneficiary free from the rights of creditors (*f*).

(*a*) *Allen* v. *Bowsey*, 7 Ch. D., at p. 466. (*b*) *Ibid.*

(*c*) *Glover* v. *Strothoff*, 2 B. C. C. 33; *Nelson* v. *Bridport*, 8 Beav. 574; *Martin* v. *Martin*, 2 Ry. & M. 507.

(*d*) Lew. 74; *Att.-Gen.* v. *Sands*, Hard. 488; *Pawlett* v. *Att.-Gen.*, *ib.*, 469; *Burgess* v. *Wheate*, 1 Ed. 595; *Duke of Norfolk's Case*, 3 Ch. Cas. 1. As to trusts void for attempting to alter the law of devolution of an absolute equitable gift, see *Re Dixon*, *Dixon* v. *Charlesworth*, [1903] 2 Ch. 458; 72 L. J. Ch. 642, and *Re Hanbury*, *Hanbury* v. *Fisher*, [1904] 1 Ch. 415.

(*e*) *Cadell* v. *Palmer*, Tud. L. C. Conv. 578; *Griffith* v. *Vere*, *ib.*, 618.

(*f*) *Graves* v. *Dolphin*, 1 Sim. 66; *Snowdon* v. *Dales*, 6 Sim. 524; *Brandon* v. *Robinson*, 18 Ves. 429.

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(c) trusts restricting the power of alienation of the beneficiaries' interest (*g*);

(d) trusts promoting or encouraging immorality (*h*), fraud, or dishonesty;

(e) trusts tending to the general restraint of marriage (*i*) (unless of a second marriage) (*k*).

(2) An illegal trust will not vitiate other provisions in the settlement unconnected with the illegal purpose (*l*).

(3) Trusts of personal estate, or of English land, are not void by our law, although prohibited by the law of the domicile of the settlor (*m*); provided that by that law he had capacity to contract (*n*).

PARAGRAPH 1 (a).

Perpetuities

It is against public policy that property should be settled on special trusts for an indefinite period, so as to prevent it being freely dealt with; and consequently, the power of doing so has been curtailed by a rule known as the rule against perpetuities. That rule is, that every future limitation, whether by way of executory devise, or trust of real or personal property, the *vesting of which* absolutely as to personalty, or in fee or tail as to realty, is postponed beyond

(*g*) *Floyer* v. *Bankes*, 8 Eq. 115; *Sykes* v. *Sykes*, 13 Eq. 56.

(*h*) *Bladwell* v. *Edwards*, Cro. Eliz. 509.

(*i*) See *per* WILMOT, L.C.J., in *Low* v. *Peers*, Wil. Op. & Jud. 375; *Morley* v. *Rennoldson*, 2 Hare, 570; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; Story, 283.

(*k*) *Marples* v. *Bainbridge*, 1 Madd. 590; *Lloyd* v. *Lloyd*, *supra*; *Craven* v. *Brady*, 4 Ch. App. 296; and as to second marriage of a man, *Allen* v. *Jackson*, 1 Ch. D. 399.

(*l*) *H.* v. *W.*, 3 Kay & J. 382; *Cartwright* v. *Cartwright*, 3 D. M. & G. 982; *Merryweather* v. *Jones*, 4 Giff. 509; *Cocksedge* v. *Cocksedge*, 14 Sim. 244; *Evers* v. *Challis*, 7 H. L. Cas. 531; *Watson* v. *Young*, 28 Ch. D. 436; *Re Harvey*, *Peek* v. *Savory*, 39 Ch. D. 289; and *Re Bence*, *Smith* v. *Bence*, [1891] 3 Ch. 242.

(*m*) See *Re Mégret*, *Tweedie* v. *Maunder*, [1901] 1 Ch. 547; *Re Hernando*, *Hernando* v. *Sartell*, 27 Ch. D. 284; *Re Price*, *Tomlin* v. *Latter*, [1900] 1 Ch. 442; *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Re Bald*, *Bald* v. *Bald*, 76 L. T. 462; *Re Bankes*, *Reynolds* v. *Ellis*, [1902] 2 Ch. 333.

(*n*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

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lives in being and twenty-one years afterwards (with a further period for gestation where it exists), is void (*o*). This rule does not, however, apply to interests following estates tail, as they can be barred (*p*); nor to charitable bequests (*q*); nor to parliamentary grants for distinguished services; nor to trusts for the accumulation of income for payment of the settlor's debts (*r*). It is impossible within the scope of this work to go into the numerous questions which arise under this rule, for the elucidation of which the reader is referred to Mr. Lewis's learned Treatise on Perpetuities. All that need be said here is, that in considering whether limitations or trusts offend against the rule (or are in legal language "too remote"), *possible* events are to be considered. If the trust *may* in any event be too remote, it will be void, notwithstanding that in the events which have actually happened it would have vested within the prescribed period. In short, to be good, the limitation must be one of which, at its creation, it could be predicted that it *must* necessarily vest within the prescribed period (*s*).

Common law rule against double possibilities.

There is a corresponding rule which prohibits a contingent remainder being limited in favour of the unborn child of an unborn child; but this rule is not applicable to special trusts, or to executory limitations. Whether it is applicable, however, to pure equitable remainders seems questionable (*t*).

The Thellusson Act.

At common law, the power of tying up money so as to accumulate at compound interest, was co-extensive with the period for which property might be tied up under the rule against perpetuities. However, the late Mr. Thellusson

(*o*) *Cadell* v. *Palmer*, Tud. L. C. Conv. 578; *London and South Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562. But a trust to apply *the income* for a period, which may or may not exceed the limit allowed by the rule, is good, although the ultimate gift of the *corpus* may be bad. See *Re Wise, Jackson* v. *Parrott*, [1896] 1 Ch. 281.

(*p*) *Heasman* v. *Pearce*, 7 Ch. App. 275.

(*q*) *Christ's Hospital* v. *Grainger*, 1 M. & G. 460.

(*r*) *Lord Southampton* v. *Lord Hertford*, 2 V. & B. 54, 65; *Bateman* v. *Hotchkin*, 10 Beav. 426.

(*s*) *Dungannon* v. *Smith*, 12 Cl. & F. 546; *Smith* v. *Smith*, 5 Ch. App. 342; *Re Handcock*, 13 L. R. Ir. 34. As to trusts to take effect in remainder upon the failure of such trusts, see *infra*, p. 56.

(*t*) *Re Bowles, Andover* v. *Bowles*, [1902] 2 Ch. 650.

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having, by his will, directed his property to be accumulated during the lives of all his descendants living at his death (*u*), the attention of Parliament was called to the unreasonable nature of such a power. Accordingly, by the statute 39 & 40 Geo. 3, c. 98 (commonly known as the Thellusson Act), the period allowed by the common law for accumulations was further restricted to the life or lives of the grantor or grantors, settlor or settlors; *or* (not *and*) twenty-one years from the death of any grantor, settlor, devisor, or testator; *or* during the minorities of any persons who shall be living, or *en ventre sa mere*, at the time of the death of the grantor, settlor, devisor, or testator; *or* during the minorities of any persons who, under the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income directed to be accumulated. The statute, however, does not extend to any provision for payment of debts, or for raising portions for the children of the settlor, grantor, or devisor, or of any person taking any interest under the instrument directing such accumulations; nor to any direction as to the produce of timber upon any lands; nor to a trust or direction for keeping property in repair (*x*); nor to a direction to apply income for keeping up a leasehold policy of insurance (*y*).

Accumulations for the purpose of purchasing land.

In 1892 the period allowed by the Thellusson Act was further restricted where the accumulation is to be made either wholly or partially for the purchase of land only, to the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, "would for the time being (if of full age) be entitled to receive the rents, issues, profits, or income so directed to be accumulated" (*z*). The wording of the Act is not free from criticism, for if it be construed literally it could never be effectual, inasmuch as *under the instrument* directing an

(*u*) *Thellusson* v. *Woodford*, 11 Ves. 112.
(*x*) *Vine* v. *Raleigh*, [1891] 2 Ch. 13; *Re Mason*, *Mason* v. *Mason*, [1891] 3 Ch. 467.
(*y*) *Re Gardiner*, *Gardiner* v. *Smith* [1901] 1 Ch. 697.
(*z*) 55 & 56 Vict. c. 58. The Act applies even where the will was made before 1892 if the testator died after that date (*Re Baroness Llanover*, *Herbert* v. *Freshfield*, [1903] 2 Ch. 330).

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accumulation *beyond* minority, there would be no person entitled, if of full age, to the rents, issues, profits, or income. It is apprehended, however, that just as "testamentary grammar" is looked upon with indulgence, the same lenient treatment must be accorded to this and other eccentricities of parliamentary drafting, and that the true meaning is sufficiently obvious. It is also apprehended that on the analogy of the Thellusson Act, an instrument contravening the new statute would only be void as to the excess.

PARAGRAPH (1) (b).

Settlements against policy of bankruptcy law.

A trust, with a proviso that the interest of the beneficiary shall not be liable to the claims of creditors, is void so far as the proviso is concerned (*a*), if on the decease of the beneficiary, his executors would have a right to call upon the trustees retrospectively to account for the arrears (*b*).

Of course, however, a trust to A. *until* he becomes bankrupt, or alienates the property, and *then over* to B. is good (*c*), and may even take effect in respect of alienations preceding the settlement (*d*). And the trust over is equally good where the trustee is given a discretion to apply the income for the maintenance of the bankrupt and his wife, or children, *or any of them* (*e*). But a man cannot make a settlement of his own property (*f*) upon *himself* until bankruptcy, and then over (*g*); not even by an ante-nuptial marriage settlement where it might fairly be urged to be part of *the wife's* terms of the marriage bargain (*h*).

(*a*) Lew. 87. For example, see *Younghusband* v. *Gisborne*, 1 Coll. 400; *Green* v. *Spicer*, 1 R. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66; *Piercy* v. *Roberts*, 1 M. & K. 4; *Snowdon* v. *Dales*, 6 Sim. 524.

(*b*) See *Re Sanderson's Trust*, 3 Kay & J. 497.

(*c*) See *Billson* v. *Crofts*, 15 Eq. 314; *Re Aylwyn's Trusts*, 16 Eq. 585, and cases therein cited.

(*d*) *West* v. *Williams*, [1898] 1 Ch. 488.

(*e*) See *infra*, Art. 56, as to such trusts.

(*f*) See *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, overruling *Re Pearson, Ex parte Stephens*, 3 Ch. D. 807; *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872.

(*g*) *Knight* v. *Browne*, 7 Jur. (N.S.) 894; *Brooke* v. *Pearson*, 37 Beav. 181.

(*h*) *Higginbothom* v. *Holme*, 19 Ves. 88; *Ex parte Hodgson, ib.*, 208; *Re Pearson*, 3 Ch. D. 807; but consider *Re Detmold, Detmold* v. *Detmold*, 40 Ch. D. 585; and *Re Johnson Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K. B. 134; and see *infra*, p. 91.

PARAGRAPH (1) (c).

Restraint on alienation.

Trusts framed with the object of preventing the barring of entails or imposing restrictions on alienation of property *which is once given absolutely*, are contrary to the policy of the law, and are therefore void (*i*); with the single exception that trusts limiting the power of married women to alienate their separate property *during coverture* are regarded as valid. It has, however, been lately held by the Court of Appeal that such a restraint may be good even in the case of a man, if the trust was created in a country (*e.g.*, Scotland) where such restraints are allowed (*j*). And of course, a trust for a person *until* he attempts to alienate, and then a gift over in favour of some one else, is perfectly good (*k*).

PARAGRAPH (1) (d).

Trusts for future illegitimate children.

Where a man, *by deed*, creates a trust in favour of future illegitimate children (putting aside the objection as to want of certainty in the beneficiaries), the trust will be void, as being contrary to public policy, and conducive to immorality (*l*). Similarly, a trust *by will* in favour of the future illegitimate children *of another*, would clearly be a direct encouragement to such other to continue his illicit intercourse after the testator's death, and would therefore be void (*m*).

The same objection does not, however, apply to the case of a testator creating a trust *by will* in favour of *his own* future bastards; for it is impossible that it can encourage an immoral intercourse after his death. If a bequest to

(*i*) *Floyer* v. *Bankes*, 8 Eq. 115; *Sykes* v. *Sykes*, 13 Eq. 56; and as to alienation, *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 P. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66; *Brandon* v. *Robinson*, 18 Ves. 429; *Ware* v. *Cann*, 10 B. & C. 433; *Hood* v. *Oglander*, 34 Beav. 513; *Re Dugdale*, *Dugdale* v. *Dugdale*, 38 Ch. D. 176.

(*j*) *Re Fitzgerald*, *Surman* v. *Fitzgerald*, [1904] 1 Ch. 573.

(*k*) *Re Detmold*, *Detmold* v. *Detmold*, *supra*.

(*l*) *Bladwell* v. *Edwards*, Cro. Eliz. 509; Moo. 430; and see *per* MELLISH, L.J., in *Occleston* v. *Fullalove*, 9 Ch. App. 147; and *Thompson* v. *Thomas*, 27 L. R. Ir. 457.

(*m*) *Metham* v. *Duke of Devonshire*, 1 P. W. 529; *Dorin* v. *Dorin*, L. R. 7 H. L. 568; *Re Ayles' Trust*, 1 Ch. D. 282.

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future bastards is to be held to be contrary to public policy, it must be because it tends to promote an immoral intercourse in the testator's lifetime. But this it cannot do, because the mistress must know that it could be revoked at any moment (*n*).

Separation deeds.

A trust to take effect upon the future separation of a husband and wife is void, as being contrary to public morals (*o*); but a trust in reference to an immediate separation, *already agreed upon*, is good and enforceable (*p*). If, however, the separation does not in fact take place, the trust becomes wholly void (*q*). The reason of this is obvious, when we consider that a provision for husband or wife, to take effect upon a future separation, is a direct encouragement to misconduct which may result in a separation; whereas, when a separation is actually agreed on, there can be no encouragement to marital misconduct in agreeing to the distribution of their income for their mutual advantage.

PARAGRAPH (1) (e).

Trusts in restraint of marriage.

Where property is settled in trust for a woman *for life* with an executory gift over if she marry a man with an income of less than £500 a year (*r*), or if she marry any person of a particular trade (*s*), the gift over is bad, as its object, as gathered from its probable result (*t*), is to restrain marriage altogether. If, however, the trust over is to take effect only upon the first beneficiary marrying a

(*n*) *Occleston* v. *Fullalove*, 9 Ch. App. 147; and see also *Re Goodwin*, 17 Eq. 345.

(*o*) *Westmeath* v. *Westmeath*, 1 Dow. (N.S.) 519; *Re Moore, Trafford* v. *Maconochie*, 39 Ch. D. 116. On the other hand, a trust in favour of a wife so long only as she shall cohabit with her husband, and on the cesser of such cohabitation a gift over to the husband, has been held valid in *Re Hope-Johnstone, Hope-Johnstone* v. *Hope-Johnstone*, [1904] 1 Ch. 470, where the cases are elaborately reviewed.

(*p*) *Wilson* v. *Wilson*, 1 H. L. Cas. 538; 5 H. L. Cas. 40; *Vansittart* v. *Vansittart*, 2 D. & J. 249; *Jodrell* v. *Jodrell*, 9 Beav. 45; and see *Jodrell* v. *Jodrell*, 14 Beav. 397.

(*q*) *Bindley* v. *Mullaney*, 7 Eq. 343.

(*r*) Sm. R. & P. Prop. 80; Story, 280—283.

(*s*) *Ibid.*

(*t*) Sm. R. & P. Prop. 80; and Story, 274–283; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255.

particular person, it would be good, as it would not be in *general* restraint of marriage (*u*).

Exception in cases of second marriage.

Moreover, the rule does not apply to second marriages. Thus where (*v*) a person, by her will, gave her residuary estate to trustees, upon trust to pay the income to her nephew and his wife (the testatrix's niece) for their joint lives and the life of the survivor, with a gift over (in the event of the nephew surviving and *marrying again*) in trust for other persons, it was held that the gift over was good. Mellish, L.J., in delivering his judgment after stating the general rule, said: "It has never been decided that it (the rule) applies to second marriages. . . . It appears to me very obvious that, if it is regarded as a matter of policy, there may be very essential distinctions between a first and a second marriage. At any rate there is this, that in the case of a second marriage, whether of a man or a woman, the person who makes the gift may have been influenced by his friendship towards the wife in the one case, and towards the husband in the other case."

Rule does not apply to gifts *until* marriage.

But although conditional or executory gifts over *divesting* an estate on marriage are void if the probable effect would be to discourage marriage altogether, yet by a curious hair-splitting, it seems to be well-established that a trust in favour of a person *until* marriage and then over is perfectly good. As was said by Wigram, V.-C., in *Morley* v. *Rennoldson* (*w*): "Until I heard the argument of this case, I had certainly understood, that without doubt, where property was limited to a person *until* she married, and when she married then over, the limitation was good. It is difficult to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation; but if the gift is *until* marriage, there is nothing to carry the gift beyond the marriage.

(*u*) Sm. R. & P. Prop. 81—107.
(*v*) *Allen* v. *Jackson*, 1 Ch. D. 399.
(*w*) 2 Ha. 570.

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. . . I am satisfied from an examination of the authorities that a gift *until* marriage, and when the party marries then over, is a valid limitation." Whether this somewhat refined distinction between executory gifts over on marriage and gifts *until* marriage would now be upheld if attacked may perhaps be doubted from the language used by the late Lord Justice JAMES in *Allen* v. *Jackson* (*x*), where he showed a tendency to construe gifts over, as being really gifts *until* the prohibited event should happen.

PARAGRAPH (2).

Illegal trusts do not necessarily avoid the trusts in same settlement.

Assuming that a trust is void for illegality, it is sometimes difficult to determine whether, and, if so, to what extent, the illegality affects other trusts in the same instrument. Where the illegality is in the consideration for the trust, then, of course, the whole instrument is tainted. For instance, trusts in favour of a mistress and her future illegitimate children are wholly void because they tend to promote continued immorality (*y*).

Cases arising under rule against perpetuities, and under Thellusson Act.

But cases in which it is not so easy to follow the reasoning of the decisions occur with regard to the rule against perpetuities and cases arising under the Thellusson Act (*z*). All difficulty, however, vanishes when it is realised that a trust is illegal so far as it tends to infringe the object of the rule which forbids it, but no farther.

Trusts in remainder after trusts void under rule against perpetuities.

Take the case of the rule against perpetuities (more fully explained *supra*, p. 49). The object of that rule is to prevent property being made inalienable for a longer period than specified lives in being and twenty-one years after the death of the survivor. Consequently, not only are trusts void which go beyond that limit, but also trusts in remainder to take effect on their failure—even trusts in favour of living

(*x*) 1 Ch. D., at p. 404; and see also the judgment of KNIGHT-BRUCE, L.J., in *Heath* v. *Lewis*, 3 D. M. & G. 954. But *cf. Re Dugdale*, *Dugdale* v. *Dugdale*, 38 Ch. D. 176.

(*y*) *Supra*, p. 53.

(*z*) 39 & 40 Geo. 3. c. 98.

persons (*a*). For if such remainders were permitted one of two alternatives would have to be faced. Either (1) the trusts in remainder would have to be accelerated (as if the illegal trusts were blotted out of the trust instrument), which would be contrary to the intention of the creator of the trust; or (2) there would be a resulting trust to the settlor or his representatives during the period for which the void trust was created, which would tie up the property beyond the legal period as effectually as if the illegal trust were itself carried out. The logical result of these considerations is therefore necessarily to avoid the remainders as well as the illegal trusts themselves.

Trusts in favour of a class, some of which infringe rule against perpetuities.

So, where a trust is for A. for life, and after her death for her children who may attain twenty-one, and the issue *per stirpes* of such of them as shall die under age, *which issue shall attain twenty-one*, the whole of the limitations after the life estate of A. are void. For although the *children* must attain twenty-one within the prescribed period, the issue of deceased children may not; and the gift being to a class as a whole, the one cannot be separated from the other (*b*).

Alternative trusts are legal and the other illegal.

But where there are alternative trusts (A. and B.), A. being illegal and B. legal; then if the contingency happens on which B. was to take effect it will not be affected by the illegality of A. (*c*). For by giving effect to trust B. the courts would in no way aid the illegality intended by trust A. nor (the contingency having happened on which B. was to come into force) would the intentions of the settlor be disregarded. If, however, the contingency on which B. was to come into operation never occurred, then, of course, the whole instrument would be void; for A. is void for illegality and B. can never take effect because the contingency contemplated by the settlor has not happened.

(*a*) *Cambridge* v. *Rous*, 8 Ves. 24; *Hale* v. *Hale*, 3 Ch. D. 643; and see *Watson* v. *Young*, 28 Ch. D. 436; and *Re Frost*, *Frost* v. *Frost*, 43 Ch. D. 246.

(*b*) *Pearks* v. *Moseley*, 5 App. Cas. 714.

(*c*) *Erers* v. *Challis*, 7 H. L. Cas. 531; *Watson* v. *Young*, 28 Ch. D. 436; *Re Harvey*, *Peek* v. *Savory*, 39 Ch. D. 289; *Re Bence*, *Smith* v. *Bence*, [1891] 3 Ch. 242; and see also *Re Abbott*, *Peacock* v. *Frigout*, [1893] 1 Ch. 54.

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So, again, where a trust for sale is void for remoteness but the beneficial interests in the proceeds are vested absolutely within the period limited by the rule, the latter will be good although the former may be bad (*d*).

Trusts infringing the Thellusson Act.

It might perhaps be thought that by analogy to the action of the courts with regard to trusts which transgress the common law period, a trust which endeavoured to go beyond the period allowed by the Thellusson Act for accumulations (see *supra*, p. 50) would be wholly void; but this is not so. The statute is merely *prohibitory* of accumulations going beyond the period prescribed by it; and, being in derogation of a common law right, is construed strictly. Consequently, as accumulations which exceed that period, but are within the common law period, are not contrary to public policy as defined by common law, such a trust is good *pro tanto;* unless, of course, it exceeds the common law period, when it is void *in toto* (*e*).

Trusts in remainder after illegal trust to accumulate.

On similar principles remainders to take effect after the period prescribed by the settlement for the accumulation of income are not rendered void on the ground that the prescribed period exceeds the statutory period. All that the statute does is to prohibit *accumulations* beyond a certain period. When that period comes to an end the accumulations stop, and the fact of the subsequent remainders being allowed in no way tends to a breach of the statutory rule. On the other hand, such remainders are not accelerated (for that would be contrary to the settlor's intentions); but there is a resulting trust in favour of the settlor or his representatives during the time which elapses between the expiration of the statutory period and the period prescribed by the settlement.

PARAGRAPH (3).

Trusts illegal by law of settlor's domicile.

Where a trust of personal estate is intended to take effect according to the law of England, or where there is a trust of English land, it will be valid and enforceable by our

(*d*) *Re Appleby, Walker* v. *Lever*, [1903] 1 Ch. 565.
(*e*) See *Griffiths* v. *Vere*, Tud. L. C. Conv. 618, and cases there cited.

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courts, notwithstanding that such trusts are prohibited by the law of the domicile of the settlor. Thus, on the marriage of an Englishwoman with a domiciled Frenchman, personal property was settled in English form with English trustees upon trust for the lady for life, with remainder as she might by will appoint, with remainder in default of appointment to her absolutely. On her marriage she became a domiciled Frenchwoman, and by French law her power of testamentary disposition was very limited :— *Held*, nevertheless, that the settled property passed under her will (*f*).

Capacity to contract depends on law of domicile.

But although this is so, it must be remembered that the *capacity* of a person to enter into a binding contract or settlement is governed by the law of his or her domicile. Thus, an English female infant on her marriage with an Austrian purported to make a binding settlement. By English law, if she had not repudiated this on or shortly after attaining twenty-one, she would have been bound by it (*g*). But by the law of the matrimonial domicile not only was this not so, but she was *incapable of even* ratifying such a contract. Under these circumstances, it was held that, although the trust was not illegal in its inception, it had never become binding, because according to the law of her domicile the lady had never attained to a contractual capacity (*h*).

Warning as to settlements by English women about to marry foreigners.

Practitioners must, moreover, be warned that in advising English girls of fortune who are about to marry foreigners the trustees should be of English domicile ; and, indeed, it would be well to provide that none but English domiciled persons should ever be appointed new trustees. Moreover, the property should never be invested in the country of the husband's domicile ; otherwise it is not improbable that the foreign courts will order it to be transferred to the husband. The reason of this is that trusts (or substitutions, as they are called) have been abolished in most

(*f*) *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547 ; and see also cases cited *supra*, p. 49, note (*m*).
(*g*) *Edwards* v. *Carter*, [1893] A. C. 360.
(*h*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

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foreign countries, and, as the foreign judges appear to be quite incapable of grasping our idea of dual ownership (the legal ownership of the trustee and the equitable ownership of the beneficiaries), they incontinently order the trust property (if found within their jurisdiction) to be handed over to the beneficiary for the time being entitled to the income, regarding the trustees merely as mandatories or agents for them, and not as legal owners.

Even where an Englishwoman is about to marry a person domiciled here, it must be remembered that they may subsequently change their domicile. Thus, if they were to reside permanently in Scotland, the Scottish law would apply in the absence of an English settlement; and, as the Scottish Married Women's Property Act, 1881 (44 & 45 Vict. c. 21), only applies where the husband is domiciled in Scotland *at the date of the marriage*, he would acquire marital rights over his wife's personal estate which were never contemplated when the parties married. The moral to be derived from all this is that an English settlement is always desirable on the marriage of an Englishwoman.

ART. 11.—*Necessity or otherwise of Writing and Signature.*

(1) An express trust of property other than land (created *inter vivos*) may be made verbally (*k*).

(2) An express trust of land, or an interest in land (created *inter vivos*), cannot be enforced unless it is evidenced by some writing, signed by the settlor (*l*), showing clearly what the intended

(*k*) *M'Fadden* v. *Jenkyns*, 1 Ph. 157; *Hawkins* v. *Gardiner*, 2 Sm. & G. 451; *Benbow* v. *Townsend*, 1 M. & K. 506; *Middleton* v. *Pollock*, 4 Ch. D. 49; *New, etc. Trustee* v. *Hunting*, [1897] 2 Q. B. 19.

(*l*) *I.e.*, by the beneficial owner (Statute of Frauds, 29 Car. 2. c. 3, s. 7). "Land" includes copyholds (*Withers* v. *Withers*, Amb. 152) and leaseholds (*Forster* v. *Hale*, 3 Ves. 696).

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trust is, or referring to some other document which does so (*m*).

(3) An express trust of any kind of property, if intended to be testamentary, must be created by a duly executed and attested will or codicil (*n*). Even where property is devised or bequeathed to a person *as trustee* the trust cannot be declared by a subsequent instrument other than a codicil (*o*). In such cases there is a resulting trust in favour of the testator's heir or next of kin.

(4) The above rules do not apply where they would operate to effectuate a fraud (*p*). In particular, where a bequest or devise has been communicated to the donee in the testator's lifetime, and he has verbally undertaken to hold it merely as trustee for a specific purpose, he will be bound (*q*).

PARAGRAPHS (1) AND (2).

What writing is required must be clear and unambiguous.

In *Forster* v. *Hale* (*r*), a gentleman named Burdon had a share in a colliery, and the suit was commenced for the purpose of fixing a trust upon his share for the benefit of his partners in a bank, in which he was concerned. The only written evidence of the alleged trust was contained in letters signed by the defendant. In giving judgment, Lord ALVANLEY said: "It was contended for the defendants that there is great danger in taking a declaration of trust arising from letters loosely speaking of

(*m*) *Kronheim* v. *Johnson*, 7 Ch. D. 60; *Tierney* v. *Wood*, 19 Beav. 330; *Rudkin* v. *Dolman*, 35 L. T. 791.

(*n*) 1 Vict. c. 26, s. 9, and Statute of Frauds, s. 5.

(*o*) *Addlington* v. *Cann*, 3 Atk. 141; *Briggs* v. *Penny*, 3 M. & G. 546; 3 De G. & S. 547; *Re Boyes*, *Boyes* v. *Carritt*, 26 Ch. D. 531; *Haberyham* v. *Vincent*, 2 Ves. jun. 230.

(*p*) *Per* Lord WESTBURY, *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Stickland* v. *Aldridge*, 9 Ves. 219; *Haigh* v. *Kaye*, 7 Ch. App. 469; *Re Duke of Marlborough*, *Davis* v. *Whitehead*, [1894] 2 Ch. 133; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Re Stead*, *Witham* v. *Andrew*, [1900] 1 Ch. 237.

(*q*) See *Re Carritt*, *Boyes* v. *Carritt*, 26 Ch. D. 531.

(*r*) 3 Ves. 696.

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trusts, which might or might not be actually and definitely settled between the parties with such expressions as 'our,' 'your,' etc., intimating some intention of a trust; that upon such grounds the court may be called upon to execute a trust in a manner very different from that intended, and that it is absolutely necessary that it should be clear from the declaration what the trust is. That I certainly admit. The question, therefore, is whether sufficient appears to prove that Burdon did admit and acknowledge himself a trustee, and whether the terms and conditions on which he was a trustee sufficiently appear (*s*). I do not admit that it is absolutely necessary that he should have been a trustee from the first. *It is not required by the statute that a trust should be created by a writing . . . but that it should be manifested and proved by writing;* plainly meaning that there should be evidence in writing, proving that there was such a trust."

Verbal trust of stock.

In *Kilpin* v. *Kilpin* (*t*), a person transferred stock into the name of an illegitimate daughter and her husband and their two eldest children, and by parol declaration, confirmed by an *unsigned* entry in a memorandum book, declared that such investments were to be for the benefit of *all* his daughter's children:—*Held*, a good declaration of trust, as the stock was personal estate.

Request to debtor to hold debt in trust.

So in *M'Fadden* v. *Jenkyns* (*u*), a creditor desired his debtor to hold the debt in trust for A. The debtor acquiesced, and paid over part of the money to A.; and it was held that the creditor had made a valid declaration of trust, and had constituted the debtor a trustee of the debt for A.

PARAGRAPH (3).

Verbal testamentary trust, void.

But where the trust is testamentary, that is to say, only intended to operate after death, the trust must, *in the absence of fraud*, be contained in a duly executed or attested

(*s*) For an instance where the terms did not sufficiently appear, see *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*t*) 1 M. & K. 521. (*u*) 1 Ph. 153.

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will or codicil. Thus, in *Re Boyes, Boyes* v. *Carritt* (*uu*), a testator, who died in 1882, made a will devising and bequeathing all his property to the defendant Carritt, and appointing him sole executor. Mr. Carritt, who was the solicitor of the testator and drew the will, gave evidence to the effect that the intention of the testator was *that he should hold the property as trustee* for objects of the testator's bounty, who were to be afterwards indicated by him. No direction, however, on the subject, was given by the testator in his lifetime, but after his death two letters were found, written by him to Mr. Carritt, and sealed up, in both of which he expressed a desire that Mr. Carritt should have £25 to buy a trinket in memory of him, and that all the rest of the property should go to a lady named Brown. Under these circumstances, *it being clear that Mr. Carritt was a trustee*, the question was whether the trust for the lady, Mrs. Brown, was valid and effectual, or whether he was a constructive trustee for the next of kin. KAY, J., after examining the authorities, came to the conclusion that, as the law stood, if a trust was not declared by a testator when his will was made, then, in order to make the trust binding, *it was essential that it should be communicated to the devisee or legatee in the testator's lifetime, and that he should accept that particular trust.* A devisee or legatee could not, by accepting an indefinite trust of this kind, enable a testator to make an unattested codicil. Accordingly, it was declared that the trust was for the next of kin. In reading this case, the reader must bear in mind that Mr. Carritt admitted that he knew that he was not meant to take beneficially, and, therefore, of course, it would have been personal fraud on his part if he had claimed to do so. If, however, he had not known the non-beneficial nature of the bequest, the subsequent letters of the testator would not have been sufficient to have deprived Mr. Carritt of the beneficial interest, and consequently neither Mrs. Brown nor the next of kin would have taken anything. Whether, however, Mr. Carritt had or had not known, when the will was made, that he was

(*uu*) 26 Ch. D. 531; and see also *Vincent* v. *Vincent*, 35 W. R. 7.

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only intended to take as trustee, yet, if the testator had subsequently *communicated to him* that he was not to take beneficially, and had either declared specific trusts of the property, or had simply said that he had not yet made up his mind upon what trusts it should be held, and if Mr. Carritt had *expressly assented to act as trustee*, then, as his assent would have operated to induce the testator not to alter his will, Mr. Carritt would have been bound to take the property as trustee simply, *and to carry out the testator's intention* (*v*) (as in the first illustration to paragraph (4), *infra*), or to hold the property as under a resulting trust, if no intention had been declared.

A testator gave his residuary real and personal estate upon trust for sale, and upon further trust to pay the proceeds to his friends A. and B. in equal shares. And he declared that he bequeathed such proceeds "to the said A. and B., their executors, administrators and assigns, absolutely, in the full confidence that they would carry out his wishes in respect thereof." A. and B. survived the testator, but died before the distribution of the estate. On these facts, it was held by CHITTY, J., that parol evidence that the testator had communicated his wishes verbally to one of the two legatees, was inadmissible, and that as (apart from such evidence) the precatory words were not sufficient to create a trust, A. and B. took the proceeds of the residue absolutely (*w*).

PARAGRAPH (4).

Fraud an exception to rule.

But where a father is induced not to make a will by statements of his heir presumptive that the latter would make suitable provision for his immediate relatives, the court considers that that is a fraud, and, notwithstanding the statute, will oblige the heir to make a provision in

(*v*) *Re Fleetwood*, *Sidgreaves* v. *Brewer*, 15 Ch. D. 594; *Re Huxtable*, *Huxtable* v. *Crawford*, [1902] 2 Ch. 793; but distinguish *Re Hetley*, *Hetley* v. *Hetley*, *ib.*, 866, where a verbal *power* (as distinguished from a verbal *trust*) was held void.

(*w*) *Re Downing's Estate*, 60 L. T. 140; and see also *Re King*, 21 L. R. Ir. 273, and *Smart* v. *Prujean*, 6 Ves. 560.

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conformity with his implied obligation (*x*). For (as was said by Lord WESTBURY, in *McCormick* v. *Grogan*) (*y*), "the court has, from a very early period, decided, that even an Act of Parliament shall not be used as an instrument of fraud; and that equity will fasten upon the individual who gets a title under that Act, and impose upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way a court of equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills. And if an individual on his death-bed, or at any other time, is persuaded by his heir-at-law or next of kin to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends upon the disponee to carry into effect, and the disponee assents to it (either expressly or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request), then undoubtedly the heir-at-law in one case, and the disponee in the other, will be converted into trustees; simply on the principle that an individual shall not be benefited by his own personal fraud."

Fraud by one of two joint legatees.

"The authorities establish the following propositions: If A. induces B. either to make or to abstain from revoking

(*x*) *Sellack* v. *Harris*, 5 Vin. Ab. 521; *Strickland* v. *Aldridge*, 9 Ves. 219. See also *Re Pitt-Rivers*, *Scott* v. *Pitt-Rivers*, [1902] 1 Ch. 403.

(*y*) L. R. 4 H. L. 82. The American courts follow the English with regard to the admissibility of parol evidence in cases of fraud generally, but in *Bedillon* v. *Seaton*, 3 Wall, junr. 279, a distinction was taken between cases like *McCormick* v. *Grogan*, where a father was fraudulently induced *not* to make a will, and cases like those cited below, where a testator was fraudulently induced either to make or to abstain from revoking a will. In the former case the American court differed from ours, holding that no trust could be enforced on the heir, who merely took by descent or operation of law, although, in the latter class of cases, where the trustee *ex maleficio* had *procured* a devise or bequest for himself, it was admitted that the trust could be proved by parol. It would seem, too, that the American courts will not enforce a mere promise by a legatee unless there was *actual* fraud or undue influence (see *Salter* v. *Bird*, 103 Pa. St. 403; *Raysdale* v. *Raysdale*, 68 Miss. 92), whereas our courts would seem to infer fraud from the breach of such a promise.

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a will leaving him property, by *expressly promising or even tacitly consenting* (*e.g.* by attesting a memorandum to that effect (*z*)) to carry out B.'s wishes concerning it, the court will hold this to be a trust, and will compel A. to execute it: see *McCormick* v. *Grogan* (*a*), where Lord HATHERLEY says: 'But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—in cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform.' If A. induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as *tenants in common*, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not (*b*); the reason stated being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as *joint tenants*, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A., and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C. (*c*); the reason stated being that no person can claim an interest under a fraud committed by another. In the latter case, A. and not C. is bound (*d*); the reason stated being that the gift is not tainted with any fraud in procuring the execution of the will" (*e*).

(*z*) *Re Maddock*, *Llewelyn* v. *Washington*, [1902] 2 Ch. 220, and see *French* v. *French*, [1902] 1 I. R. 172, and *Re Huxtable*, *Huxtable* v. *Cranford*, *supra*.

(*a*) *Ubi supra*.

(*b*) *Tee* v. *Ferris*, 2 K. & J. 357.

(*c*) *Russell* v. *Jackson*, 10 Hare, 204; *Jones* v. *Badley*, 3 Ch. App. 362.

(*d*) *Burney* v. *Macdonald*, 15 Sim. 6; *Moss* v. *Cooper*, 1 J. & H. 352.

(*e*) *Per* FARWELL, J., in *Re Stead*, *Witham* v. *Andrew*, [1900] 1 Ch. 237, 240.

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Fraud under conveyances *inter viros*.

The rule as to admissibility of parol evidence where there is fraud, is equally applicable to cases where one has fraudulently induced the execution of a conveyance. Therefore, where the plaintiff purported to assign to the defendant an agreement for a lease absolutely, but there appeared to have been a parol collateral arrangement that the defendant should hold part of the premises in trust for the plaintiff, it was held that such a trust could be proved by parol evidence. For (assuming the arrangement to have been in fact made) to exclude parol evidence would operate to effectuate a fraud (*f*).

(*f*) *Booth* v. *Turle*, 16 Eq. 182; *Re Duke of Marlborough, Davis* v. *Whitehead*, [1894] 2 Ch. 133; and see to like effect *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, where the rule was applied to foreign land.

CHAPTER III.

VALIDITY OF DECLARED TRUSTS IN RELATION TO LATENT MATTERS.

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ART. 12.—*Who may be a Settlor.*

Every person who can hold and dispose of any legal or equitable (*a*) estate or interest in property may create a trust in respect of it.

Infants.

Broadly speaking, an infant cannot effectually dispose of property, and, therefore, cannot make an irrevocable settlement. This statement is, however, subject to several qualifications.

(1) In the first place, if an infant makes a settlement which, if made by an adult, would bind the property itself, it is not void but voidable; and unless he repudiates it on or shortly after attaining his majority, he will be taken to have ratified it (*b*). Section 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), only prohibits *actions being brought to*

(*a*) *Gilbert* v. *Overton*, 2 H. & M. 110; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Donaldson* v. *Donaldson*, Kay, 711.
(*b*) *Duncan* v. *Dixon*, 44 Ch. D. 211.

charge the infant on a ratification, and therefore has no effect upon settlements (*c*). Art. 12.

(2) Secondly, males over the age of twenty, and females over the age of seventeen years can now, upon marriage or afterwards (*d*), with the approbation of the High Court (acting in pursuance of the power given to it by the statute 18 & 19 Vict. c. 43, explained by 23 & 24 Vict. c. 83), make binding settlements of real and personal estate belonging to them in possession, reversion, remainder, or expectancy. This Act, however, has only removed the disability of *infancy*, leaving unaffected other disabilities (if any), such as lunacy or coverture. In fact, under it, a married female infant of sound mind may do all that an adult married woman could do, and no more (*e*).

(3) Thirdly, the property of a female infant may become bound by a covenant to settle it entered into by her husband (even without her joinder) in consideration of the marriage. This is the probably unforeseen result of s. 19 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which provides that "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made *or to be made* whether before or after marriage respecting the property of any married woman." An ante-nuptial settlement contained a covenant by the husband with the trustees that he would settle or concur with the wife in settling any property which, during the coverture, should come to her or him in her right. The wife was no party to the covenant. Subsequently she became entitled to personal estate under her mother's will. It was held that as apart from the Act such a covenant would have bound the property, the above section took away the rights which the wife would otherwise have taken under the Act (*f*). The covenant in this case was made before the Act of 1882, but it has been

(*c*) *Edwards* v. *Carter*, [1893] A. C. 360. But where an infant has a foreign domicile, and by the law of that domicile ratification is disallowed, the settlement will not be binding even although not expressly repudiated (*Viditz* v. *O'Hagan*, [1900] 2 Ch. 87).

(*d*) *Re Phillips* (*an Infant*), 34 Ch. D. 467; *Re Sampson and Wall*, 25 *ib.* 482.

(*e*) *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 13 App. Cas. 61.

(*f*) *Hancock* v. *Hancock*, 38 Ch. D. 78.

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held that the principle is equally applicable to a settlement by a female infant and her proposed husband executed since that Act, and which, on attaining twenty-one, she expressly repudiated (*g*), and to a settlement by the husband alone without the wife's joinder (*h*).

Of course, however, these cases only relate to such proprietary interests of the wife, as previously to the Act would have been capable of alienation by the husband alone *jure mariti*. They, therefore, do not touch property *settled* to her separate use, nor the inheritance in real or copyhold estates which could only be effectually alienated by her and her husband together.

Married women.

Women married since December 31st, 1882, are in the same position with regard to their beneficial interest in property as spinsters (*i*). They can, therefore, create trusts in relation to it, either by act *inter vivos*, or by testamentary disposition. Women married prior to that date are in the same position with regard to any property as to which their title first accrued (whether as a possessory or a reversionary title (*j*)) *since* December 31st, 1882. With regard to other married women, they can only alienate (and therefore can only create trusts) in the following cases, viz.:

(1) Where they are donees of a power of appointment (*k*);

(2) Where the property is settled to their separate use (*l*) without restraint on anticipation;

(3) Where the property is their separate property under the repealed Married Women's Property Act of 1870 (33 & 34 Vict. c. 93);

(*g*) *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307.

(*h*) *Buckland* v. *Buckland*, [1900] 2 Ch. 534. This seems to put it out of the power of a woman, who is about to marry, to keep the control of her own property, if the bridegroom chooses to make a settlement of it behind her back, unless she previously assigns it to a trustee for her herself for her separate use.

(*i*) 20 & 21 Vict. c. 57.

(*j*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); and see *Reid* v. *Reid*, 31 Ch. D. 402. But as to when a title does first accrue, *cf. Re Parsons, Stockley* v. *Parsons*, 62 L. T. 929; 45 Ch. D. 51.

(*k*) *Burnett* v. *Mann*, 1 Ves. sen. 156.

(*l*) *Taylor* v. *Meads*, 34 L. J. Ch. 203.

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(4) Where the property is real estate, and their husbands join in an acknowledged deed;

(5) Where the property is reversionary personalty, their title to which is derived under an instrument (other than their marriage settlement) executed after December 31st, 1857, and their husbands join in an acknowledged deed (*m*).

Corporations.

Prior to 5 & 6 Will. 4, c. 76, municipal corporations were able to create trusts of their property (*n*); but since that Act *corporations included in the schedule to it* are themselves made trustees of their property for public purposes, and consequently cannot create trusts of it (*o*).

Lunatics.

A lunatic cannot create either a testamentary trust, or a trust *inter vivos* in favour of volunteers, unless he possesses sufficient intelligence to recall the nature and extent of his property, or the persons who have a claim on his bounty, and a judgment sufficiently free from morbid aberration and external control to judge those claims (*p*). On the other hand, where a person who is a lunatic in fact, but is not known to be so to persons privy to valuable consideration, executes a settlement, it would seem that it would not be set aside, either at law or in equity (*q*). It must, however, be borne in mind that a lunatic may be incapable of contracting a valid marriage; and it is conceived (although not without doubt) that a settlement executed by such an one in consideration of an intended marriage could not be said to be a settlement based on value, inasmuch as such a marriage would be null. The case in fact would come under the principle which has been applied to settlements made in consideration of marriage with a deceased wife's sister (*r*).

(*m*) 20 & 21 Vict. c. 57.
(*n*) *Colchester* v. *Lowton*, 1 V. & B. 226.
(*o*) 5 & 6 Will. 4, c. 76, s. 94; *Att.-Gen.* v. *Aspinall*, 2 M. & C. 613.
(*p*) See *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; *Roe* v. *Nix*, [1893] P. 55; *Boughton* v. *Knight*, L. R. 3 P. & M. 68.
(*q*) See *Molton* v. *Camroux*, 2 Exch. 487, 503; affirmed 4 Exch. 17; and *Price* v. *Berrington*, 3 M. & G. 486; *Neill* v. *Morley*, 9 Ves. 478.
(*r*) See *Pawson* v. *Brown*, 13 Ch. D. 202; and *Neale* v. *Neale*, 79 L. T. 629, and see, *infra*, p. 119.

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Convicts.

A convict (*i.e.*, one sentenced to death or penal servitude for treason or felony (*s*)) is incapable, until the expiration of his sentence, or until his death (*t*), of alienating or charging his property; and therefore he is incapable of declaring a trust of it, at all events by act *inter vivos*. This incapacity, however, is suspended for any period during which the convict may be at large under ticket of leave (*u*).

ART. 13.—*Who may be Beneficiaries.*

(1) Every person who is capable of holding property may be a beneficiary under a trust (*v*); but persons incapable of holding property cannot.

(2) A trust to perform certain acts which are of no benefit to any human being is not enforceable (*x*), unless it is a charitable trust (*y*). But it is not void unless it transgresses the rule against perpetuities (*z*), or is contrary to public policy (*a*); and the trustee may therefore perform it if he wishes (*z*).

PARAGRAPH (1).

Corporations.

A corporation cannot be beneficiary of lands without licence under the Mortmain Acts; for without such

(*s*) 33 & 34 Vict. c. 23, s. 6.

(*t*) *Ib.*, ss. 7 and 8. *Quære*, whether this Act would prevent a convict making a valid will.

(*u*) *Ib.*, s. 30. (*v*) Lewin, 40.

(*x*) *Re Rickard*, *Rickard* v. *Robson*, 31 Beav. 244; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Thompson* v. *Shakespear*, Johns. 612; *Fowler* v. *Fowler*, 33 Beav. 616; *Fisk* v. *Att.-Gen.*, 4 Eq. 521; *Hunter* v. *Bullock*, 14 Eq. 45; *Dawson* v. *Small*, 18 Eq. 114; and *per* NORTH, J., in *Re Dean*, *Cooper-Dean* v. *Stevens*, 41 Ch. D. 552.

(*y*) Trusts may be charitable, although not directly benefiting human beings, *e.g.*, trusts for providing a home for lost dogs, trusts for the protection of animals liable to vivisection (*Re Douglas*, *Obert* v. *Barrow*, 35 Ch. D. 472); and trusts for repairing a church or churchyard (*Re Vaughan*, *Vaughan* v. *Thomas*, 33 Ch. D. 187).

(*z*) *Re Dean*, *ubi supra*, at p. 557.

(*a*) *Brown* v. *Burdett*, 21 Ch. D. 667.

licence it cannot hold lands, and therefore cannot take through the medium of a trust. There are, however, numerous statutory exceptions to this in relation to municipal corporations, incorporated trading companies, colleges and the like too numerous to mention in this work. Art. 13.

Aliens.

Similarly, before the Act 33 Vict. c. 14, an alien, as he could hold property against everyone except the Crown, could also be a beneficiary of land as against everyone except the Crown (*b*). But as he could not take a legal estate by operation of law, so likewise he could not be a beneficiary by act of law (*c*). As the above Act is not retrospective, it would seem that aliens who acquired lands anterior to the passing of the Act, are not protected by it; and that the Crown is entitled to all lands of which they are beneficiaries (*d*).

Married women

Although, by recent legislation, married women are as capable of holding property as other people, they were not, previous to 1883, in so favourable a position. At common law, the husband was entitled to all his wife's personal chattels in possession; to the rents and profits of her freeholds during their joint lives; to all her choses in action which he should reduce into possession during the marriage; and to all her leaseholds. But if he did not reduce the choses in action into possession, or dispose of the leaseholds during the marriage, they reverted to the wife if she survived him. Courts of equity, however, in this instance, did not follow the law, but invented that peculiar equitable estate known as a "separate use," under which, property which is settled in trust for a woman for her separate use, is freed from the *jus mariti*. With regard to property so settled, a married woman is regarded as a *feme sole*. She may dispose of it without her husband's consent, either by act *inter vivos*, or by will (*e*), unless she is expressly restrained from anticipation. In the latter case she cannot

(*b*) *Barrow* v. *Wadkin*, 24 Beav. 1; *Rittson* v. *Stordy*, 3 Sm. & G. 230; *Sharp* v. *St. Saureur*, 7 Ch. App. 343.
(*c*) *Calvin's Case*, 7 Rep. 49.
(*d*) *Sharp* v. *St. Saureur*, *supra*.
(*e*) *Peacock* v. *Monk*, 2 Ves. sen. 190; *Taylor* v. *Meads*, 34 L. J. Ch. 203.

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dispose of it at all without the sanction of the court; which may, however, be obtained where it is clearly for her benefit, on summons under s. 39 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

PARAGRAPH (2).

Trusts to raise and keep in repair tombs.

Although it would seem that the court could not *enforce* a trust for applying money in the erection of a tomb or monument (inasmuch as there would be no human beneficiary to set the court in motion) it has been said that such trusts are not *void*, but merely duties of imperfect obligation; and that the trustees may safely spend the money on the prescribed object if they please (*f*). The judge added, that he knew of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument, if the donor took care to limit the time for which the trust was to last, so as to provide for its cesser within the limits of the rule against perpetuities. Where, however, a testator creates a trust for the repair of tombs or monuments, without limiting its continuance in accordance with such rule, it will be absolutely void for remoteness (*g*). On the other hand, a similar indefinite trust for keeping a church or churchyard in repair, would be valid, as it would be considered a charitable trust in favour of the congregation of the church, and the rule against perpetuities does not apply to charitable trusts (*h*). It has also been recently decided, that a testator may make a gift to a charity conditionally upon his tomb being kept in repair, with a gift over to another charity in the event of the tomb being allowed to fall into disrepair (*i*).

(*f*) *Per* NORTH, J., *Re Dean, Cooper-Dean* v. *Stevens*, 41 Ch. D., at p. 557.

(*g*) *Re Vaughan, Vaughan* v. *Thomas*, 33 Ch. D. 187. See also *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936, where an unsuccessful attempt was made to extend the period to twenty-one years after the death of the survivor of all persons living at the testator's death.

(*h*) *Re Vaughan, Vaughan* v. *Thomas, supra; Hoare* v. *Osborne*, 1 Eq. 585; *Re Rigley*, 1 W. R. 342.

(*i*) *Re Tyler, Tyler* v. *Tyler*, [1891] 3 Ch. 252.

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American rule.

The American courts have held that a trust to keep in repair for ever the tombs *of a class* (*e.g.*, the testator's family) is a charitable trust and valid, although a similar trust to keep up the tomb of an individual is not; but the distinction seems somewhat fantastic (*k*).

Trusts for the benefit of dogs, horses, etc.

On the same principles a trust, limited in point of time within the rule against perpetuities, to apply money for keeping specified pet animals in comfort during their lives, is perfectly legal, although no person could enforce it (*l*). Moreover, dogs and horses and other domestic animals are considered so useful to man, that it is settled that a *charitable* trust of undefined continuance may be established in their favour (*m*). CHITTY, J., also held that antivivisection societies are charities, on the ground that their *object* (whether rightly or wrongly) was the prevention of cruelty to animals useful to man (*n*).

Capricious trusts relating to the management of inanimate objects.

On the other hand where directions are given to trustees to manage property in a manner absolutely capricious, and without either human interest or benefit to any living being, it would seem that the trust is absolutely void, and that the person entitled to the property by law can claim it at once as if the trust had never been declared. Thus, where a house was devised to trustees in trust to block up windows and doors for twenty years, and at the end of that period upon trust to convey it to A. in fee, it was held that the first trust was void, and that the heir-at-law took the house during the twenty years (*o*). So in America it has been held that a trust to keep a favourite clock of the testator in repair was void (*p*). It is, however, difficult in principle to

(*k*) *Swasey* v. *American Bible Society*, 57 Me. 527; *Piper* v. *Moulton*, 72 Me. 155.

(*l*) *Re Dean, Cooper-Dean* v. *Stevens*, *supra*; and *Mitford* v. *Reynolds*, 16 Sim. 105.

(*m*) *Per* NORTH, J., *Re Dean, Cooper-Dean* v. *Stevens*, *supra*, at p. 557; and see *Armstrong* v. *Reeves*, 25 L. R. Ir. 325.

(*n*) *Re Foreaux, Cross* v. *London Antivivisection Society*, [1895] 2 Ch. 501. Curiously enough, it is believed that no case of trusts in favour of animals has ever been before the American courts.

(*o*) *Brown* v. *Burdett*, 21 Ch. D. 667.

(*p*) *Kelly* v. *Nichols*, 17 R. I. 306.

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distinguish these cases from those relating to the keeping up of tombs, unless the latter are allowed as a concession to human weakness or sentiment. The whole of the cases relating to this question require to be reviewed by the House of Lords before any intelligible principle can be extracted from them.

ART. 14.—*When Voidable for Failure of Consideration, Mistake, or Fraud.*

(1) The Court will cancel a trust at the suit of the settlor or his representatives (*q*), if the object with which the trust was created has failed (*r*).

(2) The Court will cancel or rectify (as the case may require) a settlement executed in ignorance or mistake (*s*), or in consequence of fraud or undue influence (*t*); provided that the settlor has not acquiesced in the settlement after the influence has ceased, or after he has become aware of the legal effect of it (*u*); and that the parties can be restored to their original positions (*x*).

PARAGRAPH (1).

Total failure of consideration.

In *Essery* v. *Cowlard* (*r*), by a settlement in consideration of a then intended marriage, executed in 1877, it was declared that a sum of stock, which had been transferred by the intended wife to trustees, should be held by them on trusts

(*q*) *Anderson* v. *Elsworth*, 3 Giff. 154; *Tyars* v. *Alsop*, 37 W. R. 339; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

(*r*) See *Essery* v. *Cowlard*, 26 Ch. D. 191; *Bond* v. *Walford*, 32 Ch. D. 238.

(*s*) *Phillips* v. *Mullings*, 7 Ch. App. 244; *Forshaw* v. *Welsby*, 30 Beav. 343; and see as to mistake where a provision for daughters was omitted by the engrossing clerk, *Re Daniel's Settlement*, 1 Ch. D. 375; and see *Clark* v. *Girdwood*, 7 Ch. D. 9.

(*t*) *Osmond* v. *Fitzroy*, 3 P. W. 129; *Huguenin* v. *Baseley*, 14 Ves. 273; *Dent* v. *Bennett*, 4 M. & C. 277; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Cooke* v. *Lamotte*, 15 Beav. 234.

(*u*) *Davies* v. *Davies*, 9 Eq. 468, and cases cited; *Allcard* v. *Skinner*, 36 Ch. D. 145.

(*x*) *Johnston* v. *Johnston*, 52 L. T. 76.

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for her benefit and that of the intended husband, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother of these children against the trustees to have it set aside; and it was held that the contract to marry having been absolutely put an end to, the court could cancel the settlement. A similar decision was arrived at in the more recent case of *Bond* v. *Walford* (*r*), where an intended marriage had been simply broken off.

PARAGRAPH (2).

Cancellation for ignorance or mistake.

Cancellation on the ground of ignorance, mistake, fraud, or undue influence usually occurs where the settlement is voluntary. It is not, however, confined to voluntary settlements, although the court will more readily cancel a settlement for which no consideration was given than one based on value.

Onus of proof of ignorance or mistake.

Indeed, until comparatively recently, it was considered that, where a trust was voluntary, and the settlor invoked the aid of the court to set it aside, the *onus* was immediately cast on the beneficiaries of showing that all the provisions of the settlement were proper and usual; or, that if there were any unusual provisions, they were brought to the knowledge of, and understood by, the settlor (*y*). In particular, the absence of a power of revocation was considered to be fatal unless it could be conclusively shown that the settlor had been advised to insert one, and had deliberately elected not to do so (*z*).

This view, however, was dissented from by the Court of Appeal in *Hall* v. *Hall* (*a*), and by the late Sir GEORGE JESSEL, M.R., in *Dutton* v. *Thompson* (*b*), and appears to be no longer law. In the latter case the late Master of the Rolls said: "I emphatically disagree with the ground on which some judges have set aside voluntary settlements, namely, that there were provisions in them which were

(*y*) *Phillips* v. *Mullings*, *supra*.
(*z*) *Coutts* v. *Acworth*, 8 Eq. 558; *Wollaston* v. *Tribe*, 9 Eq. 44; *Ereritt* v. *Ereritt*, 10 Eq. 405.
(*a*) 8 Ch. App. 430.
(*b*) 23 Ch. D. 278.

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not proper to be inserted in such settlements. It is not the province of a Court of Justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper. No doubt if the settlement were shown to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable person would have allowed to be omitted, *that is an argument that he did not understand the settlement.* But in no other way would it be a reason for setting it aside." In *Henry* v. *Armstrong* (*c*), KAY, J., said: "No doubt there are to be found in the reported cases, *dicta* to the effect that the *onus* of supporting a voluntary deed rests upon those who set it up; but I do not think that these *dicta* go so far as to say, that whenever a voluntary settlement is impeached on any ground whatever, the *onus* is at once thrown on those who would maintain it. As I understand it, the law is, that anybody of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act; and if he comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside."

Apparent conflict between authorities

This remark as to *onus* is in apparent conflict with a *dictum* of the late Lord HATHERLEY in *Phillips* v. *Mullings* (*d*), where his lordship said: "It is clear that anyone taking any advantage under a voluntary deed, and setting it up against the donor, must *show* that he thoroughly understood what he was doing." It is, however, respectfully apprehended that Lord Justice KAY's *dictum* is not inconsistent with Lord HATHERLEY's; for the latter merely said that where the beneficiaries set up the deed *against the donor*, the *onus* is upon the beneficiaries; while the Lord Justice

(*c*) 18 Ch. D. 668. The authorities are by no means satisfactory as to the question of *onus*.
(*d*) 7 Ch. App. 244.

said, that where the *settlor asks to have the deed set aside*, the *onus* is upon him. In short, the *onus* is, in general, upon the person seeking relief, unless the beneficiary occupied a fiduciary position towards the settlor. The cases of *Dutton* v. *Thompson*, *Henry* v. *Armstrong*, and *Phillips* v. *Mullings*, coupled with *Hall* v. *Hall* (above cited) must, it is submitted, be taken to have definitely overruled the previous decisions in *Coutts* v. *Acworth* (*e*), *Wollaston* v. *Tribe* (*e*), and *Everitt* v. *Everitt* (*e*), and to have left the *onus* of showing mistake, fraud, or undue influence upon the settlor who seeks relief except (1) where the provisions of the settlement are so absurd as to raise a presumption that no sane person would have agreed to them knowingly, and (2) where the beneficiary occupied at the date of the settlement a fiduciary position towards the settlor, in which latter there is a strong *primâ facie* presumption of undue influence (*f*). Art. 14.

Illustrations of rectification for mistake.

But although a voluntary trust will not be set aside or varied for the mere asking, yet where the settlor can show that he misunderstood the effect of it, relief will be given to him. In the recent case of *James* v. *Couchman* (*g*), it appeared that the plaintiff had, by a voluntary settlement (made with the object of protecting himself against extravagant habits), assigned property to trustees, upon trust for himself for life, remainder to his wife (if any) for life, remainder to his issue, and in default of issue to his *paternal* next-of-kin. NORTH, J., while refusing to set aside the settlement, thought that the ultimate limitation was unusual, and that the settlor's attention was not called to it, and that he did not understand the effect of it; and accordingly his lordship ordered the settlement to be rectified so as to give the settlor a power of appointment in default or failure of issue. His lordship, however, was careful to add: "The fact that a usual power was omitted here would

(*e*) 8 Eq. 558.

(*f*) *Huguenin* v. *Baseley*, 14 Ves. 273; *Hylton* v. *Hylton*, 2 Ves. 547; *Hunter* v. *Atkins*, 3 M. & K. 113; *Tate* v. *Williamson*, 2 Ch. App. 55; *Allcard* v. *Skinner*, 36 Ch. D. 145; *Morley* v. *Loughnan*, [1893] 1 Ch. 736; and see Illustrations, *infra*.

(*g*) 29 Ch. D. 212; and see *Cavendish* v. *Strutt*, 19 T. L. R. 483.

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not weigh with me in the least, if I were satisfied that the omission of such a power had been brought to the attention of the settlor, as he would then have been competent to judge for himself; but it seems to me that in the present case his attention was not called to it."

Where a person, apparently at the point of death, executed a voluntary settlement, of which he recollected nothing, which was never read to him, and in which a power of revocation was purposely omitted by the solicitor on the ground that he knew the variable character of the settlor, and there was also evidence that the settlor thought that he was executing the settlement in place of a will, it was held that the settlement was revocable (*h*).

Even where there is valuable consideration given, but the settlor is infirm and ignorant, and there is reason to suppose that he did not fully understand the transaction, it will be set aside, unless it be proved that full value was given (*i*).

Fraud.

If ignorance or mistake suffices to invalidate a settlement, *a fortiori*, it will be cancelled where the settlor has been induced to make it by fraud; as, for instance, where a wife induces her husband to execute a deed of separation, in *contemplation* of a renewal of illicit intercourse (*k*). Where, however, it is not in her contemplation at the time, but she does in fact subsequently commit adultery, then as there was no original fraud, the subsequent adultery will not avoid the settlement (*l*).

Undue religious influence.

And where a confidential relationship exists between the settlor and the beneficiary at the date of the settlement, the *onus* is decidedly thrown on the beneficiary of proving affirmatively, not only that there was no undue influence exerted, but that the settlor had independent advice, and

(*h*) *Forshaw* v. *Welshy*, 30 Beav. 243; *Re Flamank*, *Wood* v. *Cock*, 40 Ch. D. 461; *Re Blake*, *Blake* v. *Power*, 37 W. R. 461.

(*i*) *Baker* v. *Monk*, 33 Beav. 719; *Clark* v. *Malpas*, 31 Beav. 80; *Longmate* v. *Ledger*, 2 Giff. 137; and see *O'Rorke* v. *Bolingbroke*. 2 App. Cas. 814; and *Re Fry*, *Fry* v. *Same*, 40 Ch. D. 312.

(*k*) *Brown* v. *Brown*, 7 Eq. 185; and see *Evans* v. *Carrington*, 2 D. F. & J. 481; and *Evans* v. *Edmonds*, 13 C. B. 777.

(*l*) *Seagrave* v. *Seagrave*, 13 Ves. 439.

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that the settlement contains all usual and proper powers and provisions; and, if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. Thus, in the leading case of *Huguenin* v. *Baseley* (*m*), where a widow lady, very much under the influence of a clergyman, made a voluntary settlement in his favour, it was held to be invalid. As BOWEN, L.J., said in an important leading case (*n*), "It is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another, to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his or her worldly position, and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed on the conscience of the recipient of the gift, and one which arises out of public policy and fair play."

Undue influence by solicitor.

On similar grounds, a gift made by a client to a solicitor, while the relation of solicitor and client exists, is voidable. And although such gift may be ratified after the relation has ceased to exist, yet, in order to establish ratification, it must be proved to the satisfaction of the court that the donor, at the time when he was a free agent, and knew of his right to recall the gift, intentionally determined to forego that right. In the absence of such evidence, the gift may be avoided, not only by the donor, but by his personal representatives (*o*). As COTTON, L.J., said (*p*): "We must find something equivalent to a present gift when the influence arising from the existence of the relationship had ceased to exist: in the words of TURNER, L.J., in *Wright* v. *Vanderplank* (*q*), there must be 'a fixed, deliberate, and unbiassed determination that the transaction should

(*m*) 14 Ves. 273.
(*n*) *Allcard* v. *Skinner*, 36 Ch. D. 145, 193; and see also *Morley* v. *Loughnan*, [1893] 1 Ch. 736.
(*o*) *Tyars* v. *Alsop*, 37 W. R. 339.
(*p*) *Ibid.*, at p. 340; and see also *Nanney* v. *Williams*, 22 Beav. 452.
(*q*) 8 De G. M. & G. 133; 4 W. R. 410; and see also *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 29 W. R. 558.

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not be impeached.' In the case of a gift to a solicitor, the court looks most carefully to see if there has been a fixed, deliberate, and unbiassed determination on the part of the donor that the transaction should not be impeached." Indeed, the Court of Appeal has laid it down that in the absence of independent advice, the presumption that the settlor was unduly influenced is absolute and irrebuttable; and has also extended the doctrine not only to gifts to the solicitor himself, but also to his wife (*r*), or his son (*s*). The same principle is equally applicable to a settlement made by a patient in favour of his medical attendant (*t*).

Undue parental influence.

So, where a deed conferring a benefit on the settlor's father is executed by a child who is not yet emancipated from his father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had independent advice, and acted on that advice (*u*); and that he executed the deed with full knowledge of its contents, and with the full intention of giving the father the benefit conferred by it (*x*). However, where such a deed is substantially a resettlement of family estates (as distinguished from a mere voluntary trust in favour of a parent), it is not essential that the child should have independent advice; and the court will not inquire whether the influence of the father was exerted with more or less force (*y*). No doubt, where the father obtains a benefit under such a deed, the jealousy of the court is aroused; yet, if, on the whole facts, the benefit is not an unfair one, the court will not set it aside (*z*). These remarks, however, do not extend to the case where a father obtains a benefit under his daughter's marriage settlement. In such cases, the daughter ought to have independent advice (*z*). In a recent case (*u*), FARWELL, J., laid it down

(*r*) *Liles* v. *Terry*, [1895] 2 Q. B. 679; *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*s*) *Barron* v. *Willis*, [1900] 2 Ch. 121; *Wright* v. *Carter*, *supra*.

(*t*) *Radcliffe* v. *Price*, 18 T. L. R. 460.

(*u*) *Powell* v. *Powell*, [1900] 1 Ch. 243.

(*x*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188; and see *Tate* v. *Williamson*, 2 Ch. App. 55; *Kempson* v. *Ashbee*, 10 Ch. App. 15, and cases cited; and *Tucker* v. *Bennett*, 38 Ch. D. 1.

(*y*) *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200; and see *Bainbrigge* v. *Browne*, *supra*.

(*z*) *Tucker* v. *Bennett*, *supra*.

broadly, that where a young person is minded to make a voluntary settlement in favour of a parent, it is not enough that he should have independent advice, unless he acts on that advice; it is the duty of a solicitor independently advising an intending settlor, to protect him against himself, and not merely against the personal influence of the donee in the particular transaction; and if his advice is not accepted he should decline to act further (*a*). The learned judge also considered that in every voluntary settlement *of this kind*, a power of revocation should be inserted. Art. 14.

Acquiescence.

However, in all these cases the settlor will get no relief if he has knowingly acquiesced in the settlement. Thus, where a father induced a young son, who was still under his roof, and subject to his influence, to make a settlement in favour of his step-brothers and sisters, it was held, that if the son had applied promptly, the court would have set it aside. But as he had remained quiescent for some years, and had made no objection to the course which he had been persuaded to follow, he was not entitled to relief. For by so doing, he had in his maturer years practically adopted and confirmed that which he had done in his early youth (*b*). Nor will the court interfere where the settlor subsequently acts under the deed, or does something which shows that he recognises its validity; unless, indeed, he was ignorant of the effect of the settlement at the date of such recognition (*c*).

Acquiescence by a lady who has entered a sisterhood.

So where a lady entered a religious sisterhood, and, under circumstances which amounted to undue influence, made a voluntary settlement in its favour; but omitted, for more than six years after severing her connection with it, to seek to have the settlement set aside, it was held that her acquiescence barred her claim for relief. As LINDLEY, L.J., said: "In this particular case, the plaintiff considered, when she left the sisterhood, what course she should take;

(*a*) Approved, *Wright* v. *Carter*, *supra*.
(*b*) *Turner* v. *Collins*, 7 Ch. App. 329.
(*c*) *Jarratt* v. *Aldam*, 9 Eq. 463; *Motz* v. *Moreau*, 13 Moore P. C. 376; *Wright* v. *Vanderplank*, 2 K. & J. 1; *Milner* v. *Lord Harewood*, 18 Ves. 259; *Davies* v. *Davies*, 9 Eq. 468. As to ignorance, see *Lister* v. *Hodgson*, 4 Eq. 30.

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and she determined to do nothing, but to leave matters as they were. She insisted on having back her will, but she never asked for her money until the end of five years or so after she had left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts, but to acquiesce in them. I regard this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned" (*d*).

Change of status.

So again, the settlement will not be cancelled unless the parties can be replaced in their original position, even where its execution was induced by most serious misrepresentations. In one case a settlor had married a lady who represented to him that she had divorced her first husband for adultery and cruelty; whereas, in point of fact, she herself had been divorced for adultery at his suit. The settlor, on discovering this, commenced an action to have the settlement set aside. PEARSON, J., dismissed it as being frivolous and vexatious; and the Court of Appeal confirmed his decision, on the ground that the plaintiff could not set aside the settlement and yet keep the only consideration which was given for it, viz., the marriage; one essential condition of cancellation being (as FRY, L.J., observed) *restitutio in integrum*, which was there impossible (*e*).

ART. 15.—*When void as against Settlor's Creditors under 13 Eliz. c. 5* (*f*).

(1) A settlement of hereditaments (*g*), corporeal or incorporeal, or of such kinds of personal property as are capable of being taken in exe-

(*d*) *Allcard* v. *Skinner*, 36 Ch. D. 145.
(*e*) *Johnston* v. *Johnston*, 52 L. T. 76.
(*f*) In this article I have attempted to digest the effect of the statute 13 Eliz. c. 5, passed "for the avoiding of feigned, covinous, and fraudulent feoffments, etc., contrived of malice, fraud, covin, collusion, or guile, to delay, hinder, or defraud creditors or others," by which it was enacted, that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods,

cution (*h*), is (independently of the bankruptcy law) void as against existing and future creditors of the settlor if it be executed with intent to defeat or delay their claims. Art. 15.

(2) Provided, nevertheless, that settlements otherwise void under this article, are valid in favour of persons (whether original beneficiaries or their assigns) who have, *bonâ fide* and without notice of the intended fraud, given, or who are privy to, valuable consideration (*i*).

(3) No delay short of the statutory period of limitation will bar an action to set aside such a settlement, the right being legal and not equitable (*j*).

PARAGRAPH (1).

Considerable conflict of judicial opinion has arisen over this statute, viz., whether an *intent* to defeat or delay

chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution to and for any intent or purpose *before declared* and expressed, shall be deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators and assigns whose action, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by such guileful, covinous or fraudulent devices and practices as is aforesaid are, shall, or might be in any ways disturbed, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect ; any pretence, colour, feigned consideration, or any other matter or thing to the contrary notwithstanding." By the fifth section it was provided that the Act should "not extend to any estate or interest in lands, etc., or goods, etc., assured upon good consideration and bonâ fide to any person not having at the time of such assurance any notice or knowledge of such covin, fraud or collusion."

(*g*) Copyholds formerly not included (*Mathews* v. *Fearer*, 1 Cox, 272), but now included by effect of 1 & 2 Vict. c. 110, s. 11.

(*h*) *Rider* v. *Kidder*, 10 Ves. 360. As to what goods come under this description, see *Barrack* v. *McCulloch*, 3 K. & J. 110 ; *Stokoe* v. *Cowan*, 29 Beav. 637 ; and as to choses in action, *Norcutt* v. *Dodd*, Cr. & Ph. 100 ; and 1 & 2 Vict. c. 110.

(*i*) *George* v. *Milbanke*, 9 Ves. 189 ; *Daubeny* v. *Cockburn*, 1 Mer. 638 ; and *Halifax Joint Stock Bank* v. *Gledhill*, [1891] 1 Ch. 31. And where the consideration for a settlement is marriage, and the intended wife knows nothing of the fraudulent intention, the settlement is good *qua* her and her children (*Kevan* v. *Crawford*, 6 Ch. D. 29).

(*j*) *Re Maddever*, *Three Towns Banking Co.* v. *Maddever*, 27 Ch. D. 523.

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creditors must be inferred *as a matter of law* where the reasonable and probable result of the settlement was to defeat or delay, although the tribunal might be convinced that, as a matter of fact, the settlor never had any such intention. In *Freeman* v. *Pope* (*k*) the late Lord HATHERLEY distinctly affirmed that such an intent must be inferred, saying: "It is established by the authorities that, in the absence of any direct proof of intention [to defraud], if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that *they must infer* the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." And GIFFORD, L.J., said: "If, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, the *law infers intent.*"

However, these *dicta* of Lord HATHERLEY and Lord Justice GIFFORD can no longer be accepted as correct, the Court of Appeal, in *Ex parte Mercer, Re Wise* (*l*), and the Privy Council in *Godfrey* v. *Poole* (*m*), having decided that the proper principle is that, "the language of the Act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay creditors, the court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors" (*n*).

The confusion which has arisen has doubtless been caused (as was pointed out by BOWEN, L.J., in a case not

(*k*) 5 Ch. App. 538.

(*l*) 17 Q. B. D. 290; and see also to same effect judgments in *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360.

(*m*) 13 App. Cas., at p. 503.

(*n*) *Per* KINDERSLEY, V.-C., in *Thompson* v. *Webster*, 4 Drew. 632, adopted and approved by the Privy Council in *Godfrey* v. *Poole*, *supra*.

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arising under this statute (*o*)) by the fact that equity judges have always had to decide questions of law and fact together. "An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud; and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury, the judge would have pointed out to them that gross negligence *might* amount to *evidence of fraud*, if it were so gross as to be incompatible with the idea of honesty; but even gross negligence, in the absence of dishonesty, did not *of itself*, amount to fraud. Cases of gross negligence in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last *a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all these cases fraud and dishonesty were the proper ratio decidendi, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest.*"

The same view had been previously expressed by Lord ESHER, M.R., in *Ex parte Mercer, Re Wise* (*p*), where his lordship said: "No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words 'necessary result' metaphysically, but in their ordinary business sense; and, of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend—to say that because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact."

(*o*) *Le Lievre* v. *Gould*, [1893] 1 Q. B., at p. 500.
(*p*) 17 Q. B. D. 290.

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LINDLEY, L.J., in the same case added: "The language which has been used in a great many cases, that a man must *in point of law* be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact—between consequences which can be foreseen and those which cannot." The rule, therefore, according to the more recent decisions, is that of common sense, viz., that the court has to decide *as a fact* in each case, what, on the whole evidence, was the intention of the settlor in making the settlement; and is not obliged to infer fraudulent intent where it did not in fact exist.

Illustrations of direct intent to delay or defeat creditors.

Where a director of a company was sued by the company, and fearing that a judgment would be given against him, made a voluntary assignment to his daughter of all his property, it was held that the fraudulent intention was manifest, and that the settlement was void as against the company, although they were not creditors at the time, and it did not appear that there were any creditors at the time (*q*). Even though the daughter was no party to the fraud, yet she was not protected, because she had not given valuable consideration.

Direct intent to delay future creditors.

And so, again, in *Spirrett* v. *Willows* (*r*), the settlor being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts; after which he collected the rest of his assets and spent them in the most reckless way, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors, and accordingly the settlement was set aside (*s*).

Again, a trader, who had for many years carried on the business of a baker and had saved money, being about to purchase a grocery business which he intended to carry

(*q*) *Reese River Co.* v. *Atwell*, 7 Eq. 347; and see *Twyne's Case*, 1 Sm. L. C. 1; 3 Coke, 80, where the authorities are collected.

(*r*) 3 De G. J. & S. 293.

(*s*) For examples of inferred fraudulent intent, see also *Freeman* v. *Pope*, 5 Ch. App. 538; *Smith* v. *Cherrill*, 4 Eq. 390; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Crossley* v. *Elsworthy*, 12 Eq. 158; and *Adames* v. *Hallett*, 6 Eq. 468.

on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business and carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, and afterwards carried on the baker's business alone until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid. On these facts, although the grocery business was not the cause of his failure, it was held that the settlement was void as against his creditors, on the ground that it was evidently executed *with the view* of putting the settlor's property out of their reach, in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing (*t*).

And so generally "a man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily; *the object being*, 'If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.' That is the very thing which the Statute of Elizabeth was meant to prevent" (*u*).

Fraudulent intent not now irrebuttably presumed from effect

However, as above pointed out, all the above illustrations must be read with this explanation, that the court considered that the facts gave rise to a *primâ facie* inference of intention to defraud. If, however, the defendant's evidence had been sufficient to convince the court that they had, in fact, no such intention, the settlements would not have been disturbed. In short, the reader is emphatically warned that the reported cases of implied fraudulent intent can only be relied upon as authorities, as to what circumstances will be sufficient to shift the onus of proof from the plaintiff to the defendant.

(*t*) *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588; and see also *Ware* v. *Gardner*, 7 Eq. 317.

(*u*) *Per* JESSEL, M.R., *Ex parte Russell, supra*; following *Mackay* v. *Douglas*, 14 Eq. 106. An unconscious paraphrase of Shakespear, "If like an ill venture, it come unluckily home, I break, and you, my gentle creditors, lose."

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This was very well exemplified in *Ex parte Mercer, Re Wise* (*v*). The facts of that case were as follows: A master mariner was married at Hong Kong on May 31st, 1881. In the following August an action for breach of promise of marriage was commenced against him, and the writ served upon him at Hong Kong on October the 8th. By the same mail he heard that a legacy of £500 had become payable to him. On October 17th he executed a post-nuptial settlement of the £500 in favour of his wife and issue, being then indebted to no one. In July, 1882, judgment in the breach of promise action went against him for £500; and in November, 1884, he was adjudicated bankrupt. It was thereupon attempted to set aside the post-nuptial settlement under Lord HATHERLEY'S *dictum* in *Freeman* v. *Pope*. The bankrupt, however, swore, and the court believed, that when he made the settlement he was in no way influenced by the action having been commenced against him, which he thought would come to nothing. On this state of facts the Divisional Court and the Court of Appeal declined to set aside the settlement.

Whether settlement containing gift over on settlor's bankruptcy is fraudulent.

Most of the above examples have been cases of *voluntary* settlements; but where *all parties to the consideration are privy to the fraud*, a settlement based on value will not be valid against the settlor's creditors. Thus, where one, by marriage settlement, settles *his own* property on himself until bankruptcy, and then over, it has been said that it is so clearly intended to defraud creditors that the wife must be assumed to have been party to that intention, and the trust over on bankruptcy will therefore, as against the general body of his creditors, be void (*w*), if, but for the limitation in question, the income would have come to the trustee in bankruptcy of the

(*v*) 17 Q. B. D. 290; see also *Kent* v. *Riley*, 14 Eq. 190; and *Re Lane Fox, Ex parte Gimblett*, [1902] 2 Q. B. 508.

(*w*) *Higginbottom* v. *Holme*, 19 Ves. 88; *Ex parte Hodgson, ib.*, 208. The case of *Re Detmold, Detmold* v. *Detmold*, 40 Ch. D. 585, seems at first sight inconsistent with this; but when the case is examined it will be seen that the sole point raised (by an originating summons in the matter of the trust) was as to the *validity* of a gift over on alienation by the husband. The larger question as to whether it was void as against creditors under the statute of Elizabeth was not raised or discussed. See *per* COZENS-HARDY, L.J., in *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch., at p. 367.

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settlor (*x*). The whole settlement will not be void, but only the gift over on bankruptcy (*y*). Moreover, the principle only applies to property of the husband, and not to property belonging to the wife or a third party (*y*). Whether it applies to property which has come to *the husband* in right of the wife, and which he has settled by a post-nuptial settlement, seems doubtful unless other circumstances show that the settlement was not made *bonâ fide*, but for the purpose of defeating creditors (*z*). In the latter case it may be void *in toto*, unless made in pursuance of an ante-nuptial agreement (*z*). Speaking broadly, a marriage settlement can only be upset as against the wife where she has been a party to the fraud (*a*). It has recently been held that the fact of the settlement containing a covenant by the husband to settle all his after-acquired property will not of itself be evidence of fraud on her part (*b*).

Fraudulent marriage settlement where wife privy to fraud.

Where, however, a person married his mistress, and with the intention of defeating his creditors, and with her knowledge of that intention, settled all or a considerable part of his property upon her, the marriage consideration did not render the settlement valid as against the settlor's creditors; for such a marriage was a mere cloak for the fraud, and the wife was *particeps criminis* (*c*).

PARAGRAPH (2).

Fraudulent settlement upheld in favour of *bonâ fide* parties to valuable consideration.

On the other hand, where a trust based on value would, as between the settlor and his creditors, be clearly void, yet it will be supported as between the creditors and persons parties to the consideration, where such parties are not privy to the settlor's fraudulent intentions. Thus, in

(*x*) See *Re Johnson Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K. B. 134.

(*y*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, overruling *Re Pearson, Ex parte Stephens*, 3 Ch. D. 807. As to the validity of such settlements where the matrimonial domicile is in a country where they are lawful, see *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573.

(*z*) *Re Holland, Gregg* v. *Holland*, *supra*.

(*a*) *Parnell* v. *Steadman*, 1 C. & E. 153.

(*b*) *Re Reis, Ex parte Clough*, [1904] W. N. 116, overruling *Ex parte Bolland, Re Clint*, 17 Eq. 115. Will doubtless be reported fully in [1904] 2 K. B.

(*c*) *Bulmer* v. *Hunter*, 8 Eq. 46; and see *Colombine* v. *Penhall*, 1 Sm. & G. 228.

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Kevan v. *Crawford* (*d*) a settlement was made in contemplation of marriage, in which, after reciting that the intended husband was indebted to his intended wife in a sum of £20,000, he covenanted to pay that sum to the trustees, upon trust that they should advance it to him on mortgage. It was then declared that the trustees should stand possessed of the £20,000 upon trust to pay the income to the intended wife for life for her separate use, with remainder to the husband during his life or until he should become bankrupt, with remainder to the children of the marriage. The recital that the intended husband was indebted to the intended wife in £20,000, was quite false, and he was at the time of the marriage in insolvent circumstances; but the intended wife had no knowledge of his insolvent circumstances, and understood nothing about the recitals in the deed. The settlor subsequently executed the mortgage to the trustees for securing the £20,000, but no money actually passed, and afterwards became bankrupt. The creditors claimed that the settlement was void as against them. It was, however, held that the settlement and the mortgage deed consequent thereon were valid so far as concerned the interests of the wife and children; for the former was no party to the settlor's fraud, and gave valuable consideration (viz., marriage) for the settlement, and the latter were parties privy to that consideration.

Onus of proof of beneficiaries' knowledge.

In short, where a trust, based on value, is sought to be invalidated as against a party privy to the consideration, or where a voluntary trust is sought to be invalidated as against a purchaser for value from a *cestui que* trust, it must be conclusively shown that such party was privy and party to the fraudulent intent. For, although he may have known that the *effect* of the assignment would be to hinder or defeat the assignor's creditors, or expectant creditors, yet if the transaction was a *bonâ fide* purchase, and not a mere collusive arrangement between the parties with the *intention* of causing such hindrance or delay, it will be

(*d*) 6 Ch. D. 29; and see *Ex parte Horne*, 54 L. T. 301, and *Parnell* v. *Steadman*, 1 C. & E. 153. The valuable consideration must be substantial, however, and not merely technical; see *Re Ridler*, *Ridler* v. *Ridler*, 22 Ch. D. 74. But *cf.* *Harris* v. *Tubb*, 42 Ch. D. 79.

upheld (*e*). It should also be observed, that the protection afforded to *bonâ fide* purchasers for value from a beneficiary under a fraudulent deed, is not confined to purchasers of legal estates or interests, but extends to purchasers of mere equitable interests (*f*). Art. 15.

Art. 16.—*When Void under Bankruptcy Act.*

(1) Even where a settlement or a specific gift (*g*) is valid as against creditors under the last preceding article, yet (*h*) it will be void as against the settlor's trustee in bankruptcy or liquidation (*i*) where voluntary, *or* made in bad faith to the knowledge of the beneficiaries (*k*), if:

(a) the settlor becomes bankrupt or liquidates his affairs within two years; or

(b) the settlor becomes bankrupt or liquidates his affairs after two but within ten years; unless it can be shown that he was solvent at the date of the settlement without the aid of the property comprised in it, and that his estate or interest in such property passed to the trustee of the settlement on the execution thereof.

(2) A mere covenant or contract made in consideration of marriage, for the future settlement

(*e*) See *Darvill* v. *Terry*, 6 H. & N. 807; *Hale* v. *Saloon Omnibus Co.*, 4 Dr. 492; judgment in *Harman* v. *Richards*, 10 Hare, 89; *Alton* v. *Harrison*, 4 Ch. App. 622; *Middleton* v. *Pollock*, 2 Ch. D. 104; *Boldero* v. *L. & W. Discount Co.*, 5 Ex. D. 47; but see *Spencer* v. *Slater*, 4 Q. B. D. 13.

(*f*) *Halifax Joint Stock Bank* v. *Gledhill*, [1891] 1 Ch. 31.

(*g*) See *Re Tankard*, [1899] 2 Q. B. 57. But premiums paid in respect of settled policies under a voluntary settlement, are not repayable: see *Ex parte Whinney*, [1900] 2 Q. B. 710; nor presents of money: *Re Plummer*, [1900] 2 Q. B. 790.

(*h*) These provisions were limited to traders by the Bankruptcy Act, 1869, but are extended to the public generally by the Act of 1883, which is not retrospective (*Ex parte Todd*, *Re Ashcroft*, 19 Q. B. D. 186).

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (1). The section does not apply to the winding up of *deceased* insolvent settlor's estates (*Re Gould*, *Ex parte Official Receiver*, 19 Q. B. D. 92).

(*k*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505.

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upon the settlor's wife or children, of any specific and ear-marked (*l*) money or property wherein he had not at the date of his marriage any estate or interest, vested or contingent (*m*) (not being money or property of or in right of his wife), is void as against the settlor's trustee in bankruptcy, unless such property or money has been actually transferred or paid pursuant to such contract or covenant, before the act of bankruptcy on which he has been adjudicated bankrupt (*n*).

(3) This article does not affect a settlement of property accrued to the settlor since marriage in right of his wife, nor the trusts of a policy of assurance effected in favour of a wife or children under s. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(4) This article does not affect the title of *bonâ fide* purchasers for value from beneficiaries without notice (*o*); nor does it put the trustee in bankruptcy in the place of the beneficiaries so as to give him priority over subsequent incumbrances created by the settlor (*p*).

PARAGRAPH (1).

Bankruptcy within two years.

Thus, a person made a voluntary settlement of an estate which was subject to a mortgage; and covenanted with the trustees that he would pay the interest on the mortgage, and, when required, would pay off the principal. It subse-

(*l*) *Ex parte Bishop, Re Tounies*, 8 Ch. App. 718.

(*m*) See *Re Andrews*, 7 Ch. D. 635. A formal transfer of future-acquired property is, in reality, nothing more than a contract to assign it when it comes into existence, and would, it is conceived, be a contract within the meaning of this rule. See *Collyer* v. *Isaacs*, 19 Ch. D. 342; and *Joseph* v. *Lyons*, 15 Q. B. D. 280.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (2); *Re Reis, Ex parte Clough*, [1904] 1 K. B. 451, overruled on other points [1904] W. N. 116.

(*o*) *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, overruling *Re Briggs and Spicer*, [1891] 2 Ch. 127, and following *Re Brall, Ex parte Norton*, [1893] 2 Q. B. 381; *Re Vansittart, Ex parte Brown, ib.* 377; *Re Plummer*, [1900] 2 Q. B. 790.

(*p*) *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176; and *Re Farnham*, [1895] 2 Ch. 799.

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quently, and within two years, turned out that his assets (exclusive of the estate in question) were sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both, and he became bankrupt. It was held, that whether the settlement was fraudulent or not within the 13th Elizabeth it was not material to inquire; but that it clearly fell within the provisions of the Bankruptcy Act, and was therefore void (*q*).

Bankruptcy within ten years.

Upon an application to set aside a post-nuptial settlement under clause (b) of this article, it appeared that, by the settlement, a life interest was reserved to the settlor himself; and that, if this life interest were taken into account, he was able to pay his debts at the date of the settlement; but that if it was not taken into account, he was insolvent. The court held that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was valid as against his trustee in bankruptcy (*r*).

Settlement to make good breach of trust.

A settlement made by a trustee for making good a breach of trust is not voluntary (*s*), and cannot be set aside under this Act unless the beneficiaries have acted in bad faith (*t*). Nor is a settlement on a volunteer based on valuable consideration given by a third party (*u*).

Paragraph (2).

Covenants to settle future-acquired property are destroyed by bankruptcy, but not covenants to settle a sum of money.

Clause 2 of the above article only applies to specific or ear-marked property; and therefore, where a person by his marriage settlement covenants that he will pay a sum of money to the trustees, such a covenant is perfectly valid. The intention of the Act is to prevent settlements of property expected to accrue at a future time, in which the settlor has at the date of the settlement no present interest. As Mellish, L.J., put it in *Ex parte Bishop, Re Tonnies* (*v*): "The object of the legislature was to provide that specific

(*q*) *Ex parte Huxtable, Re Conibeer*, 2 Ch. D. 54. See also *Re Parry, Ex parte Salaman*, [1904] 1 K. B. 129.

(*r*) *Re Lowndes*, 18 Q. B. D. 677.

(*s*) *Sharp* v. *Jackson*, [1899] A. C. 419.

(*t*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505. Nor is it a fraudulent preference, *Re Lake, Ex parte Dyer*, [1901] 1 Q. B. 710; *Sharp* v. *Jackson*, *supra*.

(*u*) *Re Dale and Elsden*, W. N. (1892) 56. (*v*) 8 Ch. App. 718.

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money or property which, but for the section, would have gone to the trustees [of the settlement] exclusively, should be divided among the creditors [of the settlor]. A covenant to settle such money or property would, in equity, have bound it when it came into actual possession, and the intention was, that if the covenantor had no interest at the time, it should go to the creditors, and not to the trustees, of the settlement. If this had been a covenant that in case any property was left to the covenantor by his father or any other person, he would settle it, and the covenantor had no interest in it at the time, the covenant would be void against the trustee in bankruptcy. The word 'money' refers to something of the same nature as 'property,' namely, something specific, and does not apply to that which is a mere debt due from the settlor." However, it has quite recently been held by the Court of Appeal that even in the case of property falling within the Act, if it accrued to the settlor *after* his discharge, it would remain bound by the covenant. The section in question only avoids such covenants as against the trustee in bankruptcy, who would, of course, have no claim to property which only vested in the bankrupt after his discharge; and although the bankruptcy, *ipso facto*, cancels all the debtor's ordinary contracts, it would not affect such an one as this, which is capable of being specifically performed (*w*).

PARAGRAPH (3).

Settlement of property acquired through wife not destroyed by bankruptcy.

A wife who was married in 1883, and was then possessed of separate property, allowed that property, after the marriage, to pass into her husband's hands; not as a gift but as a loan for the purposes of his trade. The husband having applied part of this money to his own use, settled the residue of it, together with other property of his own, upon trusts under which he took a life interest, with a proviso for the cesser thereof in the event of his bankruptcy. The wife had no notice of any fraudulent intention

(*w*) *Re Reis, Ex parte Clough*, [1904] W. N. 116. This important case (only decided as this work was going to press) will doubtless be reported fully in [1904] 2 K. B.

on his part. In an action by the husband's trustee in bankruptcy to set aside the settlement it was held that it was not voluntary, and was *qua* the wife not executed in bad faith, and that to the extent of the wife's property received by the husband, the proviso for cesser of his life interest was good, and that s. 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), did not apply (*z*).

Art. 17.—*When void as against subsequent Purchasers from Settlor.*

(1) A settlement of lands is void, as against subsequent *bonâ fide* purchasers for value from the settlor, if made with intent to defeat such purchasers (*a*) ; *or* if it is revocable (*b*).

(2) Provided always, that this article in nowise prejudicially affects *bonâ fide* purchasers for value (*c*), whether they be beneficiaries under a trust based on value but fraudulent in inception, or assigns of voluntary beneficiaries (*d*).

Law on the subject before 1893.

The law on this subject, the foundation of which is the statute 27 Eliz. c. 4, has to a large extent been revolutionised by the Voluntary Conveyances Act, 1893 (*e*). Although the Statute of Elizabeth does not in any way speak of voluntary conveyances, it was for nearly 300 years held, in a long line of decisions, that every voluntary conveyance or settlement was impliedly fraudulent within that statute as against subsequent purchasers, even although no actual

(*z*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505.

(*a*) 27 Eliz. c. 4. The word "purchasers" includes mortgagees and lessees (*Dolphin* v. *Aylward*, L. R. 4 H. L. 486 ; *Doe* v. *Mores*, 2 W. Bl. 1019). As to copyholds, see *Doe* v. *Bottriell*, 5 B. & Ad. 131 ; *Currie* v. *Nind*, 1 M. & C. 17 ; and as to leaseholds, last note to *Saunders* v. *Dehew*, 2 Vern. 272.

(*b*) 27 Eliz. c. 4, s. 4 in Revised Statutes ; and see *Standon* v. *Bullock*, cit. 3 Rep. 82 b ; *Larender* v. *Blackston*, 3 Keb. 526 ; *Jenkins* v. *Keymis*, 1 Lev. 150.

(*c*) 27 Eliz. c. 4, s. 4.

(*d*) *Prodgers* v. *Langham*, Keb. 486.

(*e*) 56 & 57 Vict. c. 21.

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intention to defraud existed at the date of the settlement impeached (*f*). This was purely judge-made law, and rested on the theory that, by selling the property afterwards for valuable consideration, the settlor so entirely repudiated the former voluntary settlement, and showed his intention to sell, as to raise against him and the beneficiaries a conclusive presumption that such intention *existed when he made the voluntary settlement;* and consequently that the latter was made with intent to defeat the subsequent purchaser (*g*). This principle appears to be somewhat far-fetched, and of late years was frequently alluded to with disapprobation by learned judges, who nevertheless intimated that nothing less than legislative interference could alter a rule which had been uniformly acted on for so long a period. At length Parliament intervened, and by the above-mentioned Act of 1893, it is enacted that—

"No voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act, twenty-seven Elizabeth, chapter four, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding."

The Act does not extend to cases where the subsequent purchase has been made before June 29th, 1893; and, as many titles depend upon the validity of such subsequent purchases made before that date, it seems necessary to give some examples of the old law. It is also necessary to remind the reader that although, by reason of this statute, voluntary conveyances will no longer be *ipso facto* void as against subsequent purchasers for value, yet, under the general doctrines of equity, a voluntary conveyance *may* be postponed to a subsequent purchaser for value *without notice* if the latter should get a conveyance of the legal estate, or if the beneficiaries under the voluntary settlement have been

(*f*) *Doe* v. *Manning*, 9 East, 57; *Trowell* v. *Shenton*, 8 Ch. D. 318.
(*g*) *Per* CAMPBELL, C.J., *Doe* v. *Rusham*, 17 Q. B. 723.

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guilty of negligence, and the settlement did not vest the legal estate in a trustee for them (*h*).

Illustrations: Express intent to defraud.

Instances of settlements framed with the express intention of defrauding subsequent purchasers are rare; but if A. and B. were to conspire together, that A. should sell his lands to B., and that A. should retain the title deeds in order to enable him to sell the land over again to C., the conveyance to B. would be void under the statute as against C.

Power of revocation.

So again, where there was, under a marriage settlement, a power reserved to the settlor to grant a long lease with or *without* rent, it was held that this was practically a power of revocation *pro tanto*, and that a subsequent mortgagee of the settlor was entitled to the property for the period during which a lease could have been granted (*i*).

Examples of the law prior to June, 1893.

An excellent example of the old law is afforded by the case of *Trowell* v. *Shenton* (*k*). There a voluntary settlement of houses was made, and some few years afterwards the settlor agreed to sell three of the houses to a purchaser. In an action by the purchaser for specific performance of this agreement, it was held that the settlement was void as against him. It must, however, be pointed out that, as the invalidity of voluntary deeds as against subsequent purchasers depended entirely on an original intention inferred from the fact of the *settlor's* subsequent attempt to sell, the doctrine only applied when the settlor himself subsequently sold; and not where the subsequent vendor was his heir, or a second voluntary grantee of the settlor (*l*).

Small consideration was sufficient to save the settlement.

However, even under the old law a very small consideration would suffice to remove a *bonâ fide* settlement from the category of voluntary settlements for the purposes of the Act of Elizabeth; far less than will suffice to support a

(*h*) See *Care* v. *Care*, 15 Ch. D. 639; *Briggs* v. *Jones*, 10 Eq. 92; *Northern Counties, etc. Insurance Society* v. *Whipp*, 26 Ch. D. 482; and judgment of Kekewich, J., in *Harris* v. *Tubb*, 42 Ch. D. 79.
(*i*) *Lavender* v. *Blackston*, 3 Keb. 526.
(*k*) 8 Ch. D. 318.
(*l*) *Per* Campbell, C.J., *Doe* v. *Rusham*, *supra*; and see *Parker* v. *Carter*, 4 Hare, 409.

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settlement made by an insolvent as against his creditors (*m*). Thus it was held, in *Price* v. *Jenkins* (*n*), that a settlement of leaseholds to which liability to pay rent and perform covenants was attached, was, from the very nature of the property, based on value; for the beneficiaries thereby took upon themselves the primary discharge of those liabilities. This decision has no application, however, where leaseholds are settled by way of sub-demise, as no *onus* is thereby imposed on the trustees (*o*).

Mutual promises good consideration.

Similarly, where there were mutual promises, each was considered to be a valuable consideration for the other. Thus it was settled, that if husband and wife, *each of them having interests*, no matter how much, or of what degree or what quality, came to an agreement which was afterwards embodied in a settlement, that was a bargain between husband and wife, which was not a transaction without valuable consideration (*p*). But where property was devised to the wife for her *separate use*, the husband had no estate or interest in it; and, consequently, if it were settled by the husband and wife, such a settlement was not considered to be based on value, inasmuch as the husband had no rights to modify (*q*). And the same principle would of course apply to property belonging to a married woman under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Under old law notice of the settlement by subsequent purchaser was immaterial.

Under the old law it was repeatedly held (although modern judges expressed strong disapproval of it), that knowledge of the existence of a voluntary settlement by a subsequent purchaser did not deprive him of the statutory priority (*r*). However, the voluntary settlement was not cancelled unless the subsequent sale was a real *bonâ fide* alienation. Thus, where the consideration for the subse-

(*m*) See *Re Ridler*, *Ridler* v. *Ridler*, 22 Ch. D. 74; *Hamilton* v. *Molloy*, 5 L. R. Ir. 339; *Rosher* v. *Williams*, 20 Eq. 210; *Ex parte Hillman*, *Re Pumfrey*, 10 Ch. D. 622. But see *Harris* v. *Tubb*, 42 Ch. D. 79.

(*n*) 5 Ch. D. 619.

(*o*) *Shurmer* v. *Sedgwick*, 24 Ch. D. 597.

(*p*) *Teasdale* v. *Braithwaite*, 4 Ch. D. 90; affirmed, 5 Ch. D. 630; *Re Foster and Lister*, 6 Ch. D. 87; and *Schrieber* v. *Dinkel*, 54 L. J. Ch. 241.

(*q*) *Shurmer* v. *Sedgwick*, *supra*.

(*r*) *Doe* v. *Manning*, 9 East, 57.

quent purchase was grossly inadequate, the sale might be impeached by the voluntary beneficiaries, on the ground that it was on the face of it a collusive arrangement between the settlor and the so-called purchaser for the purpose of relieving the former from the settlement (*s*). Art. 17.

Settlement only void *pro tanto*.

The settlement was, however, void only so far as was necessary to give effect to the subsequent transaction. For instance, in the case of property settled by a voluntary settlement, and subsequently mortgaged, the beneficiaries under the voluntary trust were entitled, subject to the mortgage; and if unsettled estates were included in the mortgage, the beneficiaries were entitled to throw the mortgage on to the unsettled estates, if they were sufficient to answer it (*t*). In *Mallott* v. *Wilson* (*u*), this was carried further, and it was held that the beneficiaries were entitled to have the debt discharged out of the settlor's general estate.

(*s*) *Doe* v. *Routledge*, Cowp. 705; *Metcalfe* v. *Pulvertoft*, 1 V & B. 180.
(*t*) *Hales* v. *Cox*, 32 Beav. 118.
(*u*) [1903] 2 Ch. 494.

CHAPTER IV.

THE CONSTRUCTION OF DECLARED TRUSTS.

ART. 18.—*Executed Trusts construed Strictly, and Executory Liberally.*

(1) An executed trust is one in which the limitations of the estate of the trustee and the beneficiaries are perfected and declared by the settlor (*a*). In the construction of executed trusts, technical terms are construed in their legal and technical sense (*b*).

(2) An executory trust is either—

(a) an agreement or covenant for the subsequent execution of a trust instrument; or

(b) a direction or declaration (usually in a will) giving instructions or short heads from which the trustee is subsequently to model a formal settlement (*c*).

In the construction of executory trusts, the court is not confined to the language used by

(*a*) See *Stanley* v. *Lennard*, 1 Eden, 95.

(*b*) *Wright* v. *Pearson*, 1 Eden, 125; *Austen* v. *Taylor*, *ib.* 366; *Brydges* v. *Brydges*, 3 Ves. 125; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; and see *Re Whiston*, *Lovatt* v. *Williamson*, [1894] 1 Ch. 661.

(*c*) See *Austen* v. *Taylor*, 1 Eden, 366; *Lord Glenorchy* v. *Bosville*, For. 3; and *Stanley* v. *Lennard*, *supra*: and see *per* CAIRNS, L.C., in *Sackville West* v. *Holmesdale*, L. R. 4 H. L. 543.

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the settlor. And where that language is improper or informal (*d*), or would create an illegal trust (*e*), or would otherwise defeat the settlor's intentions (as gathered from the motives which led to the settlement, and from its general object and purpose, or from other instruments to which it refers, or from any circumstances which may have influenced the settlor's mind (*f*)), the court will not direct an executed settlement according to the strict meaning of the words used, but will order it to be made in a proper and legal manner so as best may answer the intent of the parties (*g*).

Instances of executed and executory trusts.

A father conveys freeholds to trustees upon certain trusts in favour of his daughters, and also covenants to surrender copyholds to the same trustees, to be held by them on similar trusts. Here the trust of the freeholds is an executed trust; for the estates of the trustee and of the beneficiaries are perfect, and nothing more requires to be done. The trust of the copyholds, on the other hand, is an executory trust; for something remains to be done in order to perfect the settlement, viz., that the property should be legally vested in the trustees.

So, where a testator by will gives property to trustees, in trust *to cause it to be settled* on his daughter in strict settlement, that is an executory trust; and so are agreements for settlements, such as marriage articles.

Rule in *Shelley's Case*, when applied.

If an estate is vested in trustees and their heirs, in trust for A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being

(*d*) See *Earl of Stamford* v. *Sir John Hobart*, 3 Br. P. C. Tarl. ed. 31—33.

(*e*) *Humberston* v. *Humberston*, 1 P. W. 332.

(*f*) See *per* Lord CHELMSFORD in *Sackville West* v. *Holmesdale*, L. R. 4 H. L. 543.

(*g*) *Earl of Stamford* v. *Sir John Hobart*, *supra*; and see *Cogan* v. *Duffield*, 2 Ch. D. 44.

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an executed trust, A. (according to the rule in *Shelley's Case*, which is a rule *of law* and not merely of interpretation) will be held to take an estate tail (*h*). Of course, where the doctrine could not apply in law (owing to the life estate being equitable and the remainder legal, or *vice versâ*), the rule will not apply in equity (*i*); nor where the word "heir" is used in the sense of *persona designata* (*k*); as, for example, where the ultimate limitation is "to the person who may *then* be the heir of A."

On the other hand, in the leading case of *Lord Glenorchy* v. *Bosville* (*l*), the settlor devised real estate to trustees upon trust, upon the happening of the marriage of his grand-daughter, *to convey* the estate to the use of her for life, with remainder to the use of her husband for life, with remainder to the issue of her body, with remainders over. It was held, that though the grand-daughter would have taken an estate tail had it been an executed trust, yet as the trust was executory, and as the testator's intention was to provide for the children of the marriage, that intention would be best carried out by a conveyance to the grand-daughter for life, with remainder to her husband for life, with remainder to her first and other sons in tail, with remainder to her daughters.

And so in marriage articles, a *covenant* to settle estates to the use of the husband for life, with remainder to the wife for life, with remainder to their heirs male and the heirs of such heirs male, is always construed to mean that the settlement shall be so drawn as to give *life estates only* to the husband and wife successively (*m*); for it is not to be presumed that the parties meant to put it in the power

(*h*) *Wright* v. *Pearson*, 1 Eden. 119; *Austen* v. *Taylor*, *ib.* 366; *Jones* v. *Morgan*, 1 Bro. C. C. 206; *Jerroise* v. *Duke of Northumberland*, 1 J. & W. 559.

(*i*) *Collier* v. *M'Bean*, 34 Beav. 426.

(*k*) *Greaves* v. *Simpson*, 10 Jur. (N.S.) 609.

(*l*) 2 W. & T. L. C. 763.

(*m*) *Trevor* v. *Trevor*, 1 P. Wms. 622; *Streatfield* v. *Streatfield*, 1 W. & T. L. C. 416; *Jones* v. *Langton*, 1 Eq. Cas. Ab. 392; *Cusack* v. *Cusack*, 5 Bro. P. C. Tom. ed. 116; *Griffith* v. *Buckle*, 2 Vern. 13; *Stonor* v. *Curwen*, 5 Sim. 264; *Davies* v. *Davies*, 4 Beav. 54; *Lambert* v. *Peyton*, 8 H. L. Cas. 1.

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of the husband to defeat the very object of the settlement, which is to make a provision for the issue of the marriage (*u*).

But where the articles show that the parties understood the distinction (as, for instance, where part of the property is limited in strict settlement, and part not), the trust will be construed strictly (*o*).

Powers implied in executory trusts.

It would seem that, under a direction to settle on a woman and her children, the usual powers of maintenance and advancement ought to be inserted (*p*), and also powers of sale and exchange (*q*). So where marriage articles provide for "powers usually contained in settlements of a like nature," powers of sale, exchange, and reinvestment were authorised before the Settled Land Acts (*r*). Again, where a settlement of personalty contains a power to vary investments, and a covenant to settle after-acquired property on similar trusts, a settlement of after-acquired real estate should contain a power of sale, as that is analogous to a power of varying investments of personalty (*s*). On the other hand, a reference to certain powers will, it would seem, *primâ facie* negative any others (*t*). A direction, in marriage articles, that upon the lady having issue, a certain estate should be strictly settled, was held not to authorise a power to provide portions for younger children (*u*).

Construction of executory trusts in wills.

In a will it is obvious that the same presumption will not arise as in the case of marriage articles. Therefore, where a testator gave £300 to trustees, upon trust to lay

(*u*) As to the meaning of "issue" in marriage articles, see *Nandick* v. *Wilkes*, Gil. Eq. Rep. 114; *Burton* v. *Hastings*, *ib.* 113; *Hart* v. *Middlehurst*, 3 Atk. 371; *Maguire* v. *Scully*, 2 Hy. 113; *Burnaby* v. *Griffin*, 3 Ves. 266; *Horne* v. *Barton*, 19 Ves. 398; *Phillips* v. *James*, 2 Dr. & Sm. 404.

(*o*) *Howel* v. *Howel*, 2 Ves. sen. 358; *Powel* v. *Price*, 2 P. Wms. 535; *Chambers* v. *Chambers*, 2 Eq. Cas. Ab. 35, c. 4; *Highway* v. *Banner*, 1 Bro. C. C. 584.

(*p*) *Re Parrott*, *Walter* v. *Parrott*, 33 Ch. D. 274.

(*q*) *Wise* v. *Piper*, 13 Ch. D. 848.

(*r*) *Duke of Bedford* v. *Marquis of Abercorn*, 1 M. & C. 312.

(*s*) *Elton* v. *Elton*, 27 Beav. 634; and see *Tait* v. *Lathbury*, L. R. 1 Eq. 174; *Re Garnett-Orme and Hargreaves*, 25 Ch. D. 595.

(*t*) See *Brewster* v. *Angell*, 1 J. & W. 625.

(*u*) *Grier* v. *Grier*, L. R. 5 H. L. 688; and see *Dod* v. *Dod*, Amb. 274.

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it out in the purchase of lands, and to settle such lands to the only use of M. and her children, and if M. died without issue, "the land to be divided between her brothers and sisters then living," it was held that this gave M. an estate tail (*x*).

There is, however, no difference between the construction to be put on an executory trust created by marriage articles, and on an executory trust created by will, except so far as the former (by its very nature) furnishes more emphatically the means of ascertaining the intention of those who created the trust (*y*). In *Sackville West* v. *Holmesdale*, Lord CHELMSFORD said: "The best illustration of the object and purpose of an instrument furnishing an intention in the case of executory trusts, is to be found in the instance of marriage articles, where, the object of the settlement being to make a provision for the issue of the marriage, no words, however strong (which in the case of an executed trust would place the issue in the power of the father), will be allowed to prevail against the implied intention. So, as Sir W. GRANT said, in *Blackburn* v. *Stables* (*z*), 'in the case of a will, if it can be clearly ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict technical sense, the court, in decreeing such settlement as he has directed, will depart from his words to execute his intention.' . . There are cases of executory trusts in wills, where the words 'heirs of the body' have been made to bend to indications of intention that the estate should be strictly settled; and a direction in a will, that a settlement 'shall be made as counsel shall advise,' has been held sufficient to show that the words were not intended to have their strict legal effect.'" (*a*).

So, again, a testator bequeathed *money* to trustees upon trust to purchase real estate, and settle it upon A. for life

(*x*) *Sweetapple* v. *Bindon*, 2 Ver. 536.
(*y*) *Sackville West* v. *Holmesdale*, L. R. 4 H. L. 543; and see also *Christie* v. *Gosling*, 1 H. L. Cas. 543.
(*z*) 2 V. & B. 367.
(*a*) *Bastard* v. *Proby*, 2 Cox, 6.

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without *impeachment of waste*, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of A.'s body, and with a power to jointure. He also devised *land* to A. upon exactly similar uses. It was held, that the testator manifested an intention to give A. a life estate only; and that consequently, in the case of the executory trusts, this intention should be carried out; but that in the case of the devise, that being executed, must be construed according to the rule in *Shelley's Case* (*b*). In fact, any indication that the first taker is not to take in tail or fee is sufficient; as, for instance, a direction that he is to be unimpeachable for waste, or that he shall not have power to bar the entail, or the like (*c*).

In one case freehold property was devised to trustees upon trust to convey, assign, and assure it "unto and to the use of my son T. F., and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if T. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter R. F., her heirs, executors, administrators, and assigns":—*Held*, that the devise was an executory trust to be executed by a conveyance to the use of T. F. during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to R. F. in fee (*d*).

Where strict construction would make trust illegal

A. devised lands to a corporation *in trust to convey* to A. for life, and afterwards, upon the death of A., to his first son for life, and then to the first son of that first son for life, with remainder (in default of issue male of A.) to B. for life, and to his sons and their sons in like manner. Lord COWPER said, that though the attempt to create a perpetuity was vain, yet, so far as was consistent with the rules of

(*b*) *Papillon* v. *Voice*, 2 P. Wms. 471; *Trevor* v. *Trevor*, 1 H. L. Cas. 239.

(*c*) See *Papillon* v. *Voice*, *supra*; *Leonard* v. *Lord Sussex*, 2 Ver. 526; *Thompson* v. *Fisher*, 10 Eq. 207; *Parker* v. *Bolton*, 5 L. J. Ch. 98.

(*d*) *Thompson* v. *Fisher*, *supra*.

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law, the devise ought to be complied with; and he directed that all the sons already born at the testator's death should take estates for life, with limitations to their unborn sons in tail (*e*).

This work being a treatise on law, and not on the interpretation of wills, it is not considered necessary to examine the cases on the construction of directions to settle property, as to which the reader is referred to Underhill and Strahan's "Interpretation of Wills and Settlements."

(*e*) *Humberston* v. *Humberston*, 1 P. Wms. 332; *Williams* v. *Teale*, 6 Hare, 239; *Lyddon* v. *Ellison*, 19 Beav. 565; *Peard* v. *Kekewich*, 15 Beav. 166; but see *Blagrove* v. *Hancock*, 16 Sim. 371; and see also *Re Russell*, *Dorell* v. *Dorell*, [1895] 2 Ch. 698.

DIVISION III.

CONSTRUCTIVE TRUSTS.

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CHAPTER I.

INTRODUCTION.

ART. 19.—*Analysis of Constructive Trusts.*

(1) Constructive trusts are either resulting trusts (in which the equitable interest springs back or results to a settlor or his representatives), or non-resulting trusts.

(2) Resulting trusts arise in the three following cases, viz.:

(a) when property is given to a trustee, but the beneficial interest is not wholly disposed of (*a*).

(b) when a trust is declared which the law will not permit to be carried out (*b*).

(*a*) Art. 20. (*b*) Art. 21.

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(c) when a purchase has been made in the name of some other person than the real purchaser (*c*), or personal property has been transferred to a stranger in blood without consideration, and there is no evidence that such persons were intended to take beneficially.

(3) Constructive trusts which are not resulting arise :

(a) when some person holding a fiduciary position has made a profit out of the trust property (*d*).

(b) in all other cases where there is no express trust, but the legal and equitable rights in property are nevertheless not co-extensive and united in the same individual (*e*).

(*c*) Art. 22. (*d*) Art. 24. (*e*) Art. 25.

CHAPTER II.

RESULTING TRUSTS.

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ART. 20.—*Where Equitable Interest not wholly disposed of.*

(1) When it appears to have been the intention of a donor (*a*) that the donee was not to take beneficially, there will be a resulting trust in favour of the donor or his representatives in the following cases, viz. :

(a) if the instrument is either silent as to the way in which the beneficial interest is to be applied ; or

(b) if it directs that it shall be applied for a particular purpose (as distinguished from a mere subjection to such purpose (*b*)) which turns out to be insufficient to exhaust the property ; or

(c) if an express trust cannot be carried into effect (*c*).

(*a*) *Per* Lord HARDWICKE, *Hill* v. *Bishop of London*, 1 Atk. 618 ; *Walton* v. *Walton*, 14 Ves. 322 ; *King* v. *Denison*, 1 V. & B. 279.

(*b*) *Watson* v. *Hayes*, 5 M. & C. 125 ; *Wood* v. *Cox*, 2 M. & C. 684 ; *Cunningham* v. *Foot*, 3 App. Cas. 974 ; *Re West, George* v. *Grose*, [1900] 1 Ch. 84.

(*c*) *Stubbs* v. *Sargon*, 3 My. & Cr. 507 ; *Ackroyd* v. *Smithson*, 1 B. C. C. 503.

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(2) Where the non-beneficial character of the gift appears on the face of the instrument, no evidence to the contrary is admissible (*d*). But where it is merely presumed from the general scope of the instrument, parol evidence is (at all events in the case of gifts *inter vivos*) admissible, both in aid and in contradiction of the presumption (*e*).

PARAGRAPH (1) (a).

Devise to trustees *eo nomine*.

Thus, where real estate was devised to "my trustees," but no trusts were declared in relation to it, it was held that the trustees must hold it in trust for the testator's heir. For by the expression "trustees," unexplained by anything else in the instrument (*f*), all notion of a beneficial interest being intended in their favour was negatived (*g*).

Devise upon trusts not declared.

Again, a testator *devised* and bequeathed all his estate and effects to A. and B., their heirs, executors, and administrators, *upon trust* to convert his *personal* estate, and to stand possessed of the proceeds and of the residue of his estate and effects, upon trusts only applicable to personalty. It was held that the real estate of the testator passed to the trustees by the use of the word "devise" in the gift, and the word "heirs" in the limitation; but that as the trusts were rigidly and exclusively applicable to personal property, and as the trustees had been designated

(*d*) See *Langham* v. *Sanford*, 17 Ves. 442; *Irvine* v. *Sullivan*, 8 Eq. 673.

(*e*) 29 Car. 2, c. 3, s. 8; *Gascoigne* v. *Thwing*, 1 Vern. 366; *Willis* v. *Willis*, 2 Atk. 71; *Cook* v. *Hutchinson*, 1 Kee. 42. As to parol evidence explanatory of a *testator's* intention, see *Docksey* v. *Docksey*, 2 Eq. C. A. 506; *North* v. *Crompton*, 1 Ch. Cas. 196; *Walton* v. *Walton*, 14 V. 322; *Langham* v. *Sanford*, *supra*; *Lynn* v. *Beaver*, T. & R. 66; and *Biddulph* v. *Williams*, 1 Ch. D. 203.

(*f*) As, for instance, if the expression is used with reference to one only of two separate funds (*Bateley* v. *Windle*, 2 B. C. C. 31; *Pratt* v. *Sladden*, 14 Ves. 193; *Gibbs* v. *Ramsey*, 2 V. & B. 294).

(*g*) *Dawson* v. *Clark*, 18 Ves. 247; *Barrs* v. *Fewkes*, 2 H. & M. 60; and see *Ellcock* v. *Mapp*, 3 H. L. Cas. 492.

by that name, and so could not take beneficially, there was a resulting trust of the real estate in favour of the settlor's heirs (*h*).

PARAGRAPH (1) (b).

Residue after satisfaction of express trust.

So where there is a devise to A. upon trust to pay debts, or to answer an annuity, there is a resulting trust of what remains after payment of the debts or satisfaction of the annuity (*i*). And, on similar principles, where there was a trust for a widower until he should die or marry again, and *upon his death* the property was to be held in trust for his children (the will not saying what was to be done with it in the event of his second marriage), it was held that upon his marrying again there was a resulting trust of the income in favour of the settlor's next of kin during the residue of the widower's life (*k*).

No resulting trust where it appears that donee was to take beneficially.

On the other hand, there will be no resulting trust where a contrary intention can be collected. Thus, where debtors assigned their property to trustees in trust to sell, and *divide the proceeds* amongst their creditors in rateable proportions according to the amounts of their respective debts, it was held by the House of Lords that there was no resulting trust in favour of the debtors, in the event of there being more than sufficient to pay twenty shillings in the pound (*l*). This decision was, however, founded entirely on the construction of the particular deed, and turned apparently to some extent upon the fact that all

(*h*) *Longley* v. *Longley*, 13 Eq. 133; *Dunnage* v. *White*, 1 J. & W. 583; *Lloyd* v. *Lloyd*, 7 Eq. 458; *cf. D'Almaine* v. *Moseley*, 1 Dr. 629; *Coard* v. *Holdernesse*, 20 Beav. 147.

(*i*) *King* v. *Denison*, 1 V. & B. 279; *Watson* v. *Hayes*, 5 My. & Cr. 125; but see *contra*, *Croome* v. *Croome*, 61 L. T. 814.

(*k*) *Gowan* v. *White*, 60 L. T. 931; and see *Upton* v. *Brown*, 12 Ch. D. 872, *sed quære*, having regard to *Re Akeroyd*, *Roberts* v. *Akeroyd*, [1893] 3 Ch. 363. See also *Re Abbott's Trust*, *Smith* v. *Abbott*, [1900] 2 Ch. 326, where there was a resulting trust, a fund which had been raised for the relief of two distressed ladies.

(*l*) *Smith* v. *Cooke*, [1891] 1 A. C. 297. It is difficult, if not impossible, to reconcile this case with *Green* v. *Wynn*, 4 Ch. App. 204, which does not seem to have been quoted to their lordships.

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the best precedents contained an *express* trust (*m*) of any surplus in favour of the debtors. It must, therefore, not be rashly assumed that the same decision would be arrived at if, on the language of another creditor's deed, it should appear that the object was to *pay debts* (or a dividend on debts), and not to assign the property for better or for worse by way of accord and satisfaction. It may be observed that where, under a similar assignment to that mentioned in the last illustration, there is not enough to pay all the creditors in full, any unclaimed dividends must be applied in augmentation of the dividends of the creditors who do claim (*n*).

Charge does not imply resulting trust of residue.

So under a devise to A., charged with the payment of debts and legacies (*o*), or charged with the payment of a contingent legacy (*p*) which does not take effect, there will be no resulting trust; but the whole property will go to the devisee beneficially, subject only to the charge. And the same result will follow even where property is devised to A. "upon trust" to pay specific legacies, if on the whole will it appears that the testator merely meant to *charge* the legacies on the property (*q*).

PARAGRAPH (1) (c).

Lands vested in trustee, but no written trust.

Where lands have been conveyed to a trustee but the trusts have not been manifested and proved by a signed writing in accordance with the Statute of Frauds, there will be a resulting trust to the settlor (*r*).

(*m*) Lord HALSBURY spoke, in his judgment, of it being the "ordinary and familiar method in such cases to *express* a *resulting* trust on the face of the instrument." This, at first sight, seems to be inconsistent with the idea of a resulting trust; but doubtless his lordship used the phrase "resulting trust," not in the narrow technical sense of a *constructive* resulting trust, but in the wider, original etymological sense, of a trust (whether express or implied), springing back, or resulting, to its creator.

(*n*) *Wild* v. *Banning*, 2 Eq. 577.

(*o*) *King* v. *Denison*, *supra*; *Wood* v. *Cox*, *supra*.

(*p*) *Tregonwell* v. *Sydenham*, 3 Dow. 210.

(*q*) *Croome* v. *Croome*, 61 L. T. 814; *Re West*, *George* v. *Grose*, [1900] 1 Ch. 84.

(*r*) *Rudkin* v. *Dolman*, 35 L. T. 791; or Statute of Wills; *Re Boyes*, *Boyes* v. *Carritt*, 26 Ch. D. 531; and *Re King*, 21 L. R. Ir. 273.

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Uncertainty or failure of express trust.

So, if a declared trust is too uncertain or vague to be executed (*s*), or fails by lapse (*t*), or otherwise, or becomes in the event too remote (*u*); then, as it is expressed on the face of the instrument that the trustee was not intended to take beneficially, there will be a resulting trust. Thus, where a trade union was dissolved, and no provision was made by its rules for the distribution of its surplus assets, it was held that there was a resulting trust in favour of the members in the proportions in which they had contributed to its funds (*x*).

Total failure of consideration for express trust.

So where a settlement is executed in contemplation of a marriage which is subsequently broken off, there is a total failure of the consideration on which the settlement was based, and the property results to the settlor (*y*).

PARAGRAPH (2).

Evidence not admissible where donee is a trustee on the face of settlement.

Where a testator bequeathed money to D. absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted" it was held (1) that it was clear on the face of the will that D. did not take absolutely beneficially; (2) that therefore parol evidence was not admissible to show that the testator's intention was that she should take beneficially; and (3) that in accordance with paragraph (1) (b), *supra*, after satisfying the purposes communicated to her by the testator she was beneficially entitled to the balance, and that there was no resulting trust (*z*).

Evidence admissible in other cases.

But where a person purchased sums of stock in the names of herself and the son of her daughter-in-law, verbal

(*s*) *Stubbs* v. *Sargon*, 2 Kee. 255; *Morice* v. *Bishop of Durham*, 9 Ves. 399, and 10 Ves. 522; *Kendall* v. *Granger*, 5 Beav. 300.

(*t*) *Ackroyd* v. *Smithson*, 1 B. C. C. 503; *Spink* v. *Lewis*, 3 B. C. C. 355.

(*u*) *Tregonwell* v. *Sydenham*, 3 Dow. 194, 210.

(*x*) *Re Printers, etc. Society, Challinor* v. *Maskery* [1899] 2 Ch. 184; distinguishing *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, where under the special circumstances no resulting trust arose. See also *Re Wilcock*, 62 L. T. 317, where there was an ultimate trust contained "in a settlement of even date," which was never in fact executed.

(*y*) *Essery* v. *Cowlard*, 26 Ch. D. 191.

(*z*) *Irvine* v. *Sullivan*, 8 Eq. 673.

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evidence was admitted to rebut the presumption of a resulting trust (arising under Article 22, *infra*), because there was nothing to show on the face of the instrument that the son of the daughter-in-law was merely a trustee. JAMES, L.J., said: "Where the Court of Chancery is asked, *on an equitable assumption or presumption*, to take away from a man that which, by the common law of the land, he is entitled to, he surely has a right to say 'Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances'" (*a*).

So evidence is admissible to rebut the legal presumption as to part only—for instance, to prove that the donee was intended to take a *life interest*, although there is a resulting trust as to the remainder; and *vice versâ* (*b*).

ART. 21.—*Resulting Trusts, where Trusts declared are Illegal.*

When a person has intentionally vested property in another for an illegal purpose, then, (if the trustee expressly relies (*c*) upon the maxim "*in pari delicto, potior est conditio possidentis*,") the settlor cannot recover it (*d*) under a resulting trust, unless:

(a) the illegal purpose is not carried into execution (*e*); or

(*a*) *Fowkes* v. *Pascoe*, 10 Ch. App. 343, 349.

(*b*) *Lane* v. *Dighton*, Amb. 409; *Rider* v. *Kidder*, 10 Ves. 360; *Benbow* v. *Townsend*, 1 M. & K. 506; *London, etc. Banking Co.* v. *London, etc. Bank*, 21 Q. B. D. p. 542; *Re Blake*, *Blake* v. *Power*, 60 L. T. 663.

(*c*) *Haigh* v. *Kaye*, 7 Ch. App. 469.

(*d*) *Duke of Bedford* v. *Coke*, 2 Ves. sen. 116; *Curtis* v. *Perry*, 6 Ves. 739; *Cottington* v. *Fletcher*, 2 At. 156; *Brackenbury* v. *Brackenbury*, 2 J. & W. 391; *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Ayerst* v. *Jenkins*, 16 Eq. 275.

(*e*) *Symes* v. *Hughes*, 9 Eq. 475; *Childers* v. *Childers*, 1 De G. & J. 482; *Davies* v. *Otty*, 35 Beav. 208; *Birch* v. *Blagrave*, Amb. 264; *Platamore* v. *Staple*, G. Coop. 250. In the United States of America this distinction

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(b) the effect of allowing the trustee to retain the property might be to effectuate an unlawful object, to defeat a legal prohibition, or to protect a fraud (*f*).

Conveyance to qualify for game licence or office.

Thus where a father granted land to his son, in order to give him a colourable qualification to shoot game under the old game laws, and without any intention of conferring any beneficial interest upon him, the court would not enforce any resulting trust in favour of the father. For he and the son were *in pari delicto*, and there was no detriment to the public in allowing the son to retain the estate (*g*). Of course, if there had been no illegality (if, for instance, a bare legal estate had been a sufficient qualification), there would have been a resulting trust (*h*).

Settlement for immoral consideration.

In *Ayerst* v. *Jenkins* (*i*), a widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a settlement by which it was recited that he was desirous of making a provision for the lady, and had transferred certain shares into the names of trustees, upon the trusts thereinafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint. They afterwards lived together as man and wife until the widower's death. Some time afterwards, his personal representatives instituted a suit to set aside the settlement, on the ground

does not prevail. There the question whether the illegal purpose has failed or succeeded is deemed to be immaterial, and the only question considered is whether the *trust* is executed or executory. In the former case there is no resulting trust; in the latter the expressed trust will not be enforced.

(*f*) See *per* Lord SELBORNE in *Ayerst* v. *Jenkins*, 16 Eq. 283; and see *per* KNIGHT-BRUCE, L.J., in *Reynell* v. *Sprye*, 1 De G. M. & G. 660, where he said: "Where the parties are not *in pari delicto*, and where public policy is considered as advanced by allowing either party, or at least the more excusable of the two, to sue for relief. relief is given to him." And see also, to same effect, *Law* v. *Law*, 3 P. Wms. 393, and *St. John* v. *St. John*, 11 Ves. 525.

(*g*) *Brackenbury* v. *Brackenbury*, 2 J. & W. 391.

(*h*) *Childers* v. *Childers*, 1 De G. & J. 482.

(*i*) 16 Eq. 275.

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that it was founded on an immoral consideration. Lord SELBORNE, however, said: "Relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri*, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees for the sole benefit of the defendant. I know of no doctrine of public policy which requires or authorises a court of equity to give assistance to such a plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be *to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud*, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished (*k*), a gift intended as a bribe to iniquity. If public policy is opposed, as it is, to vice and immorality, it is no less true, as was said by Lord TRURO in *Benyon* v. *Nettlefold* (*l*), that the law in sanctioning the defence of *particeps criminis* does so on the grounds of public policy,—namely, that those who violate the law must not apply to the law for protection." In the more recent case of *Phillips* v. *Probyn* (*m*), NORTH, J., distinguished *Ayerst* v. *Jenkins* on the ground that in the case before him the settlement was made *in consideration* of a contemplated illicit so-called marriage with a deceased wife's sister. It is, however, humbly submitted, that the settlement in *Ayerst* v. *Jenkins* was also made in contemplation of, and as part of, the arrangements consequent on such a marriage, and that there is really no valid distinction between the two cases. The practitioner must also carefully bear in mind, that where property is

(*k*) As in *Symes* v. *Hughes*, *supra*.
(*l*) 3 Mac. & G. 102.
(*m*) [1899] 1 Ch. 811.

transferred to trustees in trust for the settlor *until an intended marriage* with his deceased's wife's sister is solemnized, and then in trust for the lady and issue of the marriage, the trust will be void, inasmuch as such a *marriage* cannot take place (*n*), and therefore the condition precedent can never be performed. Art. 21.

Sub-Paragraph (a).

But where the illegal purpose is only contemplated, there is a *locus pœnitentiæ*. Thus in *Symes* v. *Hughes* (*o*), the plaintiff, being in pecuniary difficulties, assigned certain leasehold property to a trustee with a view of defeating his creditors. Two and a half years afterwards he was adjudicated bankrupt, but obtained the sanction of his creditors to an arrangement by which his estate was re-vested in him, he covenanting to prosecute a suit for the recovery of the assigned property, and to pay a composition of two and sixpence in the pound to his creditors, in case his suit should prove successful. Lord Romilly, M.R., in delivering judgment, said: "Where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it." Fraudulent conveyance.

So, again, the plaintiff, being apprehensive of an indictment for bigamy (conviction for which then involved forfeiture of property), conveyed his real estate to the defendant, on a parol agreement to re-transfer when the difficulty should have passed over. It subsequently transpired that the plaintiff was not liable to be indicted, and thereupon he filed a bill praying for a re-transfer of his property. It was held, that although there was no enforceable express trust (inasmuch as there was no written proof of it), yet there was a resulting trust to which the statute Conveyance to avoid forfeiture for felony.

(*n*) *Pawson* v. *Brown*, 13 Ch. D. 202; *Neale* v. *Neale*, 79 L. T. 629.
(*o*) 9 Eq. 475.

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did not apply; and as there was no illegality in fact, but only in intention, the court ordered the transfer prayed for (*p*).

Conveyance to escape serving as sheriff.

And where a father conveyed the legal estate in property to his daughter, with the intention of thus escaping from serving as sheriff, but afterwards repented, and paid the fine, Lord HARDWICKE said: "I am of opinion that the conveyance ought not to take effect against his intention *unless he had actually taken the oath*" that he had not the requisite qualification (*q*).

SUB-PARAGRAPH (b).

Attempt to evade rule against perpetuities or accumulations.

There will also be a resulting trust where otherwise the illegal object might be attained. Thus, where a settlor attempts to settle property so as to contravene the policy of the law with regard to perpetuities, such trusts will not only not be carried into effect, but the person nominated to carry them out is held to be a mere trustee for the settlor or his representatives. For the attempt was made either through ignorance or carelessness, or else with a direct intention to contravene the law. In the former case, as there would be no *delictum*, the usual maxim would not apply. In the latter, equity would not allow the trustee to retain the property and so put it in his power to carry out the illegal intentions of the testator, and to defeat the policy of the law (*r*). So where the settlor directs accumulations beyond the statutory period, there is a resulting trust between the end of the twenty-one years and the period for which the accumulations were directed (*s*).

Attempt to evade Mortmain Acts.

And so again, where lands, or the proceeds of land, were devised to charitable uses, or were devised to one who was, under a secret agreement with the testator, pledged to apply them to charitable purposes, then, notwithstanding the

(*p*) *Davies* v. *Otty*, 35 Beav. 208.
(*q*) *Birch* v. *Blagrave*, Amb. 264.
(*r*) *Carrick* v. *Errington*, 2 P. Wms. 361; *Tregonwell* v. *Sydenham*, 3 Dow. 194; *Gibbs* v. *Rumsey*, 2 V. & B. 294.
(*s*) *Re Travis*, *Frost* v. *Greatorex*, [1900] 2 Ch. 541.

improper intentions of the testator, there was a resulting trust. For the result of allowing the gift to stand would probably have been to effect an object prohibited by law (*t*). But of course this is no longer so since the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73). Art. 21.

Art. 22.—*Resulting Trusts where Purchase made in Another's Name.*

(1) When real or personal property (*u*) is vested in the purchaser and others, or in another or others alone, and whether jointly or successively, a resulting trust will be presumed in favour of the person who is proved (by parol (*v*) or other evidence) to have paid the purchase-money (*x*) in the character of purchaser (*y*).

(2) This presumption may be rebutted—

(a) by parol (*z*) or other evidence that the purchaser intended to benefit the others; or

(b) by the fact that the person in whom the property was vested was the lawful (*a*) wife (*b*) or child of the purchaser (*c*), or was some person towards whom he

(*t*) *Arnold* v. *Chapman*, 1 Ves. sen. 108; *Addington* v. *Cann*, Barn. 130; *Springett* v. *Jennings*, 10 Eq. 488; but see *Rowbotham* v. *Dunnett*, 8 Ch. D. 430.

(*u*) *Dyer* v. *Dyer*, 2 Cox, 92; *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; *Wheeler* v. *Smith*, 1 Gif. 300.

(*v*) 29 Car. 2. c. 3, s. 8; *Ryall* v. *Ryall*, 1 Atk. 59; *Lench* v. *Lench*, 10 Ves. 517; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*x*) *Dyer* v. *Dyer*, *supra*; *Wray* v. *Steele*, 2 V. & B. 388.

(*y*) *Rochefoucauld* v. *Boustead*, *supra*.

(*z*) *Rider* v. *Kidder*, 10 Ves. 360; *Standing* v. *Bowring*, 31 Ch. D. 282.

(*a*) See *Re a Policy, etc., Scottish, etc., Society*, [1902] 1 Ch. 282.

(*b*) *Re Eykyn*, 6 Ch. D. 115; *Drew* v. *Martin*, 2 H. & M. 130.

(*c*) *Soar* v. *Foster*, 4 K. & J. 152; *Beckford* v. *Berkford*, Lofft. 490.

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stood *in loco parentis* (*d*), or was trustee of a settlement by which he previously settled property (*e*).

In any of these cases a *primâ facie* (but rebuttable (*f*)) presumption will arise that the purchaser intended the ostensible grantee or grantees to take beneficially.

(3) Similar principles apply to voluntary *transfers* made by owners of *personal estate;* but there is no presumption of a resulting trust in a voluntary conveyance of *real estate* to another's use (*g*).

PARAGRAPH (1).

Where purchase-money furnished by two persons.

Where the purchase-money is advanced, partly by the person in whose name the property is taken, and partly by another; then, if they advance it in equal shares, they will (in the absence of evidence or circumstance showing a contrary intention (*h*)) take as joint tenants, because the advance being equal the interest is equal; but if in unequal shares, then a trust results to each of them, in proportion to his advance (*i*). But if one pay the purchase-money at the request of and by way of loan to the person in whose name the property is taken, there will be no resulting trust. For the lender did not advance the purchase-money as purchaser (*k*), but merely as lender.

(*d*) *Beckford* v. *Beckford, supra ; Currant* v. *Jago*, 1 Coll. 261 ; *Tucker* v. *Burrow*, 2 H. & M. 515 ; *Forrest* v. *Forrest*, 13 W. R. 380.

(*e*) *Re Curteis*, 14 Eq. 217.

(*f*) *Tunbridge* v. *Care*, 19 W. R. 1047 ; *Williams* v. *Williams*, 32 Beav. 370.

(*g*) As to personal estate, *per* COTTON, L.J., in *Standing* v. *Bowring*, 31 Ch. D. 282 ; and *per* JESSEL, M.R., in *Fowkes* v. *Pascoe*, 10 Ch. App. 345 n ; but see JAMES, L.J., *dubitante*, *S. C.*, at p. 348, and *contra*, *per* RICHARDS, C.B., in *George* v. *Howard*, 7 Price, 646. As to real estate, *per* Lord HARDWICKE, in *Young* v. *Peachy*, 2 Atk. 257 ; and *per* JAMES, L.J., in *Fowkes* v. *Pascoe*, *supra*.

(*h*) See *Robinson* v. *Preston*, 4 K. & J. 505 ; *Edwards* v. *Fashion*, Pr. Ch. 332 ; *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 290 ; *Bone* v. *Pollard*, 24 Beav. 283.

(*i*) *Lake* v. *Gibson, supra ; Rigden* v. *Vallier*, 3 Atk. 735.

(*k*) *Aveling* v. *Knipe*, 19 Ves. 441.

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Paragraph (2).

Evidence of intention to benefit.

In *Standing* v. *Bowring* (*l*) the facts were as follows: The plaintiff, a widow, in the year 1880 transferred £6,000 consols into the joint names of herself and her godson, the defendant. This she did *with the express intention* that the defendant, in the event of his surviving her, should have the consols; but that she herself should retain the dividends during her life. She had been previously warned that her act was irrevocable. In delivering judgment, Cotton, L.J., said: "The rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *primâ facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted, by showing that, at the time, the transferor intended a benefit to the transferee; and in the present case there is ample evidence that at the time of the transfer, or for some time previously, the plaintiff intended to confer a benefit, by this transfer, on her late husband's godson."

Advancement of son.

In *Crabb* v. *Crabb* (*m*), a father transferred a sum of stock from his own name into the joint names of his son and of a broker, and told the latter to carry the dividends to the son's account. The father, by a codicil to his will executed subsequently, bequeathed the stock to another; but it was held that the son took absolutely. The Master of the Rolls said: "If the transfer is not ambiguous, but a clear and unequivocal act, as I must take it on the authorities, for explanation there is no place. The transfer being held an advancement, nothing contained in the codicil, nor any other matter *ex post facto*, can ever be allowed to alter what has been already done." In short, a resulting trust will not be allowed to arise, merely because a donor subsequently changes his mind.

(*l*) 31 Ch. D. 282; and see also *Fowkes* v. *Pascoe*, 10 Ch. App. 343.
(*m*) 1 M. & K. 511; and see also *Birch* v. *Blagrave*, Amb. 264; *Standing* v. *Bowring*, 31 Ch. D. 282; and *Batstone* v. *Salter*, 10 Ch. App. 431, where a mother transferred stock into the joint names of herself, her daughter, and her son-in-law.

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Rebutting evidence of advancement.

But a declaration made by the father *at or before* the date of the purchase is admissible to rebut the presumption, although it might not be good as a declaration of trust, on account of its not being reduced into writing. For, "as the trust would result to the father were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration" (*n*).

Surrounding circumstances.

Surrounding circumstances may also tend to rebut the presumption. Thus, a father, upon his son's marriage, gave him a considerable advancement, having several younger children who had no provision. He subsequently sold an estate, but £500 only of the purchase-money being paid, he took a security for the residue in the joint names of himself and his said son. He himself, however, received the interest, and a great part of the principal without any opposition from the son, as did his executrix after his death, the son writing receipts for the interest. Under these circumstances it was held that the son took nothing; the Lord Chancellor saying: "Where a father takes an estate in the name of his son, it is to be considered as an advancement; but that is liable to be rebutted by subsequent acts. So if the estate be taken jointly, so that the son may be entitled by survivorship, that is weaker than the former case, and still depends on circumstances. The son knew here that his name was used in the mortgage, and must have known whether it was for his own interest or only as a trustee for the father; and instead of making any claim, his acts are very strong evidence of the latter; nor is there any colour why the father should make him any further advancement when he had so many children unprovided for" (*o*). The *dictum* of the learned Chancellor, that the presumption may be rebutted by subsequent acts, cannot be taken to mean subsequent acts *of the father*, which are only admissible against, and not for, him (*p*); but must, it is

(*n*) *Williams* v. *Williams*, 32 Beav. 370.
(*o*) *Pole* v. *Pole*, 1 Ves. sen. 76; *Stock* v. *McAvoy*, 15 Eq. 55; *Bone* v. *Pollard*, 24 Beav. 283; and *Marshal* v. *Crutwell*, 20 Eq. 328.
(*p*) *Redington* v. *Redington*, 3 Ridge, 177.

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apprehended, refer only to subsequent acts of the son (and only to them when there is nothing to show that the father did actually intend to advance the son (*q*)); or to subsequent acts of the father so acquiesced in by the son as to raise the presumption that the son always knew that no benefit was intended for him. It is also to be remarked, that the fact of the father having previously made provision for the son, would not of *itself* have been sufficient to rebut the usual presumption; although, taken together with other circumstances, it was a strong link in the chain (*r*).

Where the son is the father's solicitor.

So the relationship of solicitor and client between the son and the parent has been considered a circumstance that will, of itself, rebut the presumption of advancement (*s*).

Augmentation of settled property.

Again, a sum of consols was vested in the trustees of a marriage settlement upon the usual trusts. The husband directed the bankers who received the dividends (and paid them to him as tenant for life under a power of attorney from the trustees), to invest an additional sum of £2,000 consols in the names of the same trustees, so that they might receive the dividends as before. This was done, and the husband received the income of the whole during his life. No notice of the new investment was ever given to the trustees. It was held that there was no resulting trust of the £2,000 for the husband, but that it became subject to the trusts of the settlement as an augmentation of the trust fund (*t*).

Whether presumption of advancement by married woman.

In *Re De Visme* (*u*) it was laid down, that where a married woman had, out of her separate estate, made a purchase in the name of her children, no presumption of advancement arose, inasmuch as a *married* woman was under no obligation to *maintain* her children. This case was followed by the late Sir GEORGE JESSEL, M.R., in *Bennet* v. *Bennet* (*x*), where a mother was entitled to property under the Married

(*q*) *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Hepworth* v. *Hepworth*, 11 Eq. 10.
(*r*) See *per* Lord LOUGHBOROUGH, 3 Ridge, 190.
(*s*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244, *sed quære*.
(*t*) *Re Curteis*, 14 Eq. 217.
(*u*) 2 De G. J. & S. 17. (*x*) 10 Ch. D. 474.

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Women's Property Act, 1870, by which married women were made as liable *as widows* for the maintenance of their children. The Master of the Rolls, however, gave it as his opinion, that the presumption of intention to advance, depended, not on the *liability to maintain*, but on the moral obligation on the part of a father to provide a provision or fortune for a child; and that there was no such obligation recognised on the part of a mother. If that be so, the law still remains the same, notwithstanding that the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), renders a wife as liable for the maintenance of her children as a husband is. However, it is conceived that the point is still an open one, as Sir GEORGE JESSEL'S judgment is admittedly in direct conflict with that of the late Vice-Chancellor STUART in *Sayre* v. *Hughes* (*y*); where the presumption of intention to benefit was based by the Vice-Chancellor rather on motive than on duty. His lordship said: "*Maternal affection as a motive* of bounty is perhaps the strongest of all, although *the duty* is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, and not a legal one." On the whole, it is with much diffidence conceived that if the authorities should hereafter come under review, the views of the late Vice-Chancellor STUART would be found to have as much to be said in their favour as those of Sir GEORGE JESSEL. Neither judge bases the presumption on legal obligation. Both admit that the presumption is founded on a moral presumption of intention. But if so, surely there is as much moral presumption of an intention by a mother to benefit her offspring, as there is in the case of a father. And if neither law nor equity imposes any obligation on a father to advance his child, it is difficult to see on what principle an equity judge should invent an imperfect obligation of this kind as a foundation for a presumption of intention to benefit, while at the same time rejecting a similar moral obligation on the part of a wealthy mother. In reason and in custom, there is assuredly as

(*y*) 5 Eq. 376. This was the case of a *widowed* mother, but the principle appears to be the same.

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much obligation on the part of a mother *who has the command of money*, to benefit her children with it, as there is in the case of a father. It must in any case be borne in mind, that even if the view of JESSEL, M.R., be the correct one, yet if it be proved *aliunde* that the mother did in fact intend to benefit her offspring, there will be no resulting trust (*z*).

Primâ facie presumption of resulting trust in favour of a wife whose money is invested in husband's name.

Although where a husband purchases property in his wife's name, there is a *primâ facie* presumption of an intention to advance the wife, the converse does not hold good. Therefore, if property is purchased in the name of the husband out of money belonging to the separate estate of his wife, there is a presumption of a resulting trust in favour of the wife, which is, of course, like all other cases of resulting trust, capable of being rebutted by parol or other evidence showing that it was intended to be a gift. It was formerly thought that this presumption only applied where the property was purchased with the wife's capital, and not where it was purchased with her income. But in the recent case of *Mercier* v. *Mercier* (*a*), the Court of Appeal laid it down that there is no such inherent distinction between capital and income except in degree. ROMER, L.J., said: "No doubt, in certain cases, in considering whether a gift was intended, the fact of the money having been income received by him with her consent, may be material in respect of the weight of evidence; but there is no other distinction, so far as I am aware, between capital and income." In short, it would seem that where there is no evidence one way or the other, a resulting trust will be presumed whether the property was paid for out of capital or income; but that where there is some evidence of intention to benefit the husband, then the facts that the payment was made out of income, will, to some extent, support that evidence.

Advancement by persons *in loco parentis*.

With regard to the presumption of advancement in favour of persons to whom the purchaser stands in *loco parentis*, it has been held that the presumption arose in the

(*z*) *Beecher* v. *Major*, 2 Dr. & Sm. 431. (*a*) [1903] 2 Ch. 98.

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case of an illegitimate child (*b*), a grandchild *when the father was dead* (*c*), and the nephew of a wife, who had been practically adopted by the husband as his child (*d*). But it would seem that the person alleged to have been *in loco parentis* must have intended to put himself in the situation of the person described as the natural father of the child with reference to those parental offices and duties which consist in *making provision for a child*. The mere fact that a grandfather took care of his daughter's illegitimate child and sent it to school, has been held to be insufficient to raise the presumption, PAGE-WOOD, V.-C., saying: "I cannot put the doctrine so high as to hold that if a person educate a child to whom he is under no obligation either morally or legally, the child is therefore to be provided for at his expense" (*e*).

ART. 23.—*To whom Property results.*

(1) Where a resulting trust arises under an instrument *inter vivos*, the beneficial interest results to the settlor himself (*f*).

(2) Where the instrument is a will, the property results to the heir or devisee of the testator if real estate, or to the residuary legatees or next of kin, if personal estate (*g*), whether the will contains a direction for conversion or not (*h*).

(3) Where a resulting trust has once arisen under an instrument which directs a conversion,

(*b*) *Beckford* v. *Beckford*, Lofft. 490; *Kilpin* v. *Kilpin*, 1 My. & K. 542, *sed quære Soar* v. *Foster*, 4 Kay & J. 157.
(*c*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.
(*d*) *Currant* v. *Jago*, 1 Coll. Ch. 261.
(*e*) *Tucker* v. *Burrow*, 2 H. & M. 515; and see *per* JESSEL, M.R., *Bennet* v. *Bennet*, 10 Ch. D., p. 477.
(*f*) *Symes* v. *Hughes*, 9 Eq. 475; *Davies* v. *Otty*, 35 Beav. 208.
(*g*) *Ackroyd* v. *Smithson*, 1 Wh. & Tu. 372, and cases there cited.
(*h*) *Curteis* v. *Wormald*, 10 Ch. D. 172; *Ackroyd* v. *Smithson*, *supra*.

and the person to whom it results dies before getting it in; then as between his real and personal representatives it devolves (whether actually converted at the date of his death or not) as if it were actually converted, unless the trust for conversion has *wholly* failed (*i*). Art. 23.

Paragraph (1).

Resulting trust under marriage settlement.

By a marriage settlement, real estate of the husband, and personal estate of the wife, are vested in trustees, in trust for the husband for life, with remainder in trust for the wife for life, with remainder upon the usual trusts in favour of the issue of the marriage, without any gift over in default of issue. Upon the death of the wife without issue, the real estate will result to the husband; and similarly on the death of the husband without issue, the personal estate will result to the wife.

Paragraph (2).

Resulting trust under will where no conversion directed.

A. by his will gives his real estate unto and to the use of trustees, and his personal estate to them absolutely, upon trust for certain persons for life, with an ultimate remainder in trust for the testator's two nephews B. and C. as tenants in common. B. dies in the testator's lifetime. His share of the real estate will result to the testator's heir or residuary devisee, and his share of the personalty to the testator's next of kin or residuary legatees.

Resulting trust where conversion directed.

The preceding examples speak for themselves, and require no comment. But the following case presents at first sight more difficulty. A testator devises real estate to trustees, upon trust to sell and divide the proceeds between his nephews B. and C. If B. should die in the testator's lifetime, his share of the proceeds of the sale will lapse, and result to the testator's heir or residuary devisee, and not to his next of kin or residuary legatees, although it is pure personalty. The principle from which this proceeds (settled

(*i*) *Re Richerson, Scales* v. *Heyhoe*, [1892] 1 Ch. 379; *Curteis* v. *Wormald*, *supra*; *Cogan* v. *Stephens*, 5 L. J. (N.S.) Ch. 17.

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by the leading case of *Ackroyd* v. *Smithson* (*k*)) is, that conversion directed by a will is presumed to be only intended for the purposes therein expressed; and so far as these purposes fail, equity presumes that the testator did not intend to rob his heir of property which, but for those objects, would have been his, and to give such property to his next of kin, whose only possible ground of claim arises from the fact that the testator's expressed intentions have been disappointed. Moreover, this presumption is not even rebutted by a declaration that the proceeds of the sale of realty are to be personalty *for all purposes* (*l*), the latter words being construed as all purposes *of the will*.

The question was explained with his customary lucidity by the late Sir GEORGE JESSEL in the case of *Curteis* v. *Wormald* (*m*). There, personal estate had been bequeathed upon trust to purchase real estate, which was to be held on trusts, some of which eventually failed. It was held, that land, purchased before the failure, resulted in favour of the testator's next of kin, and not his heir. The Master of the Rolls, in giving judgment, after stating the facts, said: "The limitations took effect to a certain extent, and then, by reason of the failure of issue of the tenants for life, the ultimate limitations failed, and there became a [resulting] trust for somebody. Now for whom? According to the doctrine of the Court of Equity, this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed-of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the

(*k*) 1 Wh. & Tu. 949.

(*l*) *Shallcross* v. *Wright*, 12 Beav. 505; *Taylor* v. *Taylor*, 3 D. M. & G. 190; and see also *Fitch* v. *Weber*, 6 Hare, 145.

(*m*) 10 Ch. D. 172.

persons entitled to the personal estate; that is, the persons who take under the Statute of Distributions as next of kin (*n*). Their right to the residue of the personal estate is a statutory right independent of the will. Art. 23.

Paragraph (3).

How the person to whom converted property results, holds it.

It is frequently an important question as to what nature property directed to be converted assumes in the hands of persons to whom it results. For instance, if, by a will, real estate be directed to be sold, and is actually sold, and the trusts as to one moiety of the proceeds fail, that moiety will of course result to the testator's heir. But the question then arises, does it become in his hands real or personal estate? That is to say, in the event of *his* death before he receives it, does it devolve on *his* heir or his next of kin? At one time it was considered that there was a difference, as to this, between a resulting trust of converted realty, and a resulting trust of converted personalty. It was thought that as to the former, where a sale of realty was necessary for carrying out the subsisting trusts of a will, that which resulted to the heir was retained by him as personalty, and on his death devolved as such. So far, that is still the law. But it was also considered that wherever personal estate directed to be converted into land resulted to next of kin, they held it as *personalty*, although it came to them in the form of land (*o*). This view was, however, scouted by Jessel, M.R., and finally overruled by the Court of Appeal, in the case of *Curteis* v. *Wormald* (*p*). The Master of the Rolls said: "Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed-of interest? The answer is *he takes it as he finds it*. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives; and consequently his executor takes it as part of his personal

(*n*) *Cogan* v. *Stephens*, 5 L. J. (N.S.) Ch. 17; *Bective* v. *Hodgson*, 10 H. L. Cas. 656.
(*o*) *Reynolds* v. *Godlee*, Johns. 536 (overruled).
(*p*) 10 Ch. D. 172.

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estate. On the other hand, if the next of kin, having become entitled to a freehold estate [under a resulting trust of converted personalty], dies, there is no equity to change the freehold estate into anything else on his death. It will go to the devisee of the real estate, or to the heir-at-law if he has not devised it, and will pass as real estate." And JAMES, L.J., in the Court of Appeal, said: "With all deference to the judgment of Lord HATHERLEY in *Reynolds* v. *Godlee* (*q*), it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by *Cogan* v. *Stephens* (*r*), that what was the right rule as between the real and personal estates where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land. . . . The same principle applies in both cases, which is this, that where you trace property into a man, there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land, it remains money; that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law, has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin, have no right to have it reconverted into money."

Immaterial that property not actually converted if it ought to be.

The broad statement by JESSEL, M.R., in *Curteis* v. *Wormald* (quoted in the last illustration), that the party to whom property results "takes it as he finds it," is apt to mislead the unwary. It would be more accurate to say that he takes it as he *ought* to find it. That is to say, if the trust for conversion *wholly* fails, he takes it as unconverted; but if it only partially fails, then as the conversion dates from the death of the testator (even though it is directed to be made at a future date (*s*)), he takes it as converted, and it devolves accordingly, notwithstanding that in point of fact

(*q*) *Ubi supra.*
(*r*) 5 L. J. (N.S.) Ch. 17.
(*s*) *Clarke* v. *Franklin*, 4 Kay & J. 257.

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the conversion is not, as it ought to be, carried out in accordance with the trust (*t*). A learned reviewer of the last edition of this work stated that he could not agree that this view applied to personal estate directed to be converted; and he contended that it was restricted to real estate directed to be sold (*u*). With great respect, however, and after full consideration, the present writer still remains of opinion that the decision of the late Mr. Justice Chitty in *Re Richerson, Scales* v. *Heyhoe* (*t*), is as applicable to personal estate as to real estate.

Same rules applicable to instruments *inter vivos*.

It must be pointed out that precisely the same rule applies where property results on failure of trusts created by instrument *inter vivos*. As has been pointed out above, such property results to the settlor in the first instance; but the character in which he retains it is determined by precisely the same principles as have been indicated in the last illustration. That is to say, if the conversion ought to take place, that which results is retained in its converted form, notwithstanding that the actual conversion may not be carried out until after the settlor's death. But where there has been a total failure of the objects for which conversion was directed, it results to the settlor in its unconverted form, and so devolves.

Mere power to convert.

The reader must be warned that a mere power to convert, as distinguished from an imperative trust, does not effect any conversion (*x*). But if it be exercised, the property will then be converted, unless there be a trust declared of the proceeds sufficient to reconvert it (*y*), which is always a question of construction (*z*).

(*t*) *Re Richerson, Scales* v. *Heyhoe*, [1892] 1 Ch. 379, and cases there cited.

(*u*) Law Notes, June, 1894.

(*x*) *Fletcher* v. *Ashburner*, 1 Wh. & Tu. 327.

(*y*) *De Beauvoir* v. *De Beauvoir*, 3 H. L. Cas. 524; *Greenway Greenway*, 29 L. J. Ch. 601.

(*z*) Where there is a trust to re-invest the proceeds in real *or leasehold* estate, see *Re Bird, Pitman* v. *Pitman*, [1892] 1 Ch. 279.

CHAPTER III.

CONSTRUCTIVE TRUSTS WHICH ARE NOT RESULTING.

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ART. 24.—*Constructive Trusts of Profits made by Persons in Fiduciary Positions.*

Where a person has the management of property, either as an express trustee, or as one of a succession of persons partially interested under a settlement, or as a guardian, or other person clothed with a fiduciary character, he is not permitted to gain any personal profit by availing himself of his position; and he will be constructive trustee of any profit so made for the benefit of the persons equitably entitled to the property.

Trustee renewing lease to himself.

In the leading case of *Sandford* v. *Keech* (*a*), a lessee of the profits of a market had devised the lease to a trustee for an infant. On the expiration of the lease, the trustee applied for a renewal; but the lessor would not renew, on the ground that the infant could not enter into the usual covenants. Upon this, the trustee took a lease to himself for his own benefit. It was however decreed by Lord KING, that

(*a*) Sel. Ch. Ca. 61; and see *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93; and *Brinton* v. *Lulham*, 53 L. T. 9.

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he must hold it in trust for the infant; his lordship saying: "If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestuis que* trust." The same principle is equally applicable to renewals by the husband or wife of a person in a fiduciary position (*b*).

Profit made by trustee.

So where the solicitors in an administration action presented their client, the trustee, with half of their profit costs, NORTH, J. (while holding that in the administration action he had no jurisdiction in the matter), intimated that if a separate action were brought against the trustee, he would have no defence to it (*c*).

Tenant for life of leaseholds renewing to himself.

And so also a tenant for life of leaseholds (even though they be held under a mere yearly tenancy (*d*)), who claims under a settlement, cannot renew them for his own sole benefit. For he is not permitted to avail himself of his position, as the person in possession under the settlement, to get a more durable term, and so to defeat the probable intentions of the settlor that the lease should be renewed for the benefit of *all* persons claiming under the settlement (*e*). And even where the lessor refuses to renew, the tenant for life *or his assigns* cannot purchase the lessor's interest for their own benefit, but will be considered as mere trustees of it for the persons who would be entitled to the leasehold interest if it had been renewed (*f*). In the case of *Longton* v. *Wilsby* (*g*), STIRLING, J., held that the above cases must be restricted to leases where there was a *right* of renewal either by custom or contract; but *James* v. *Dean* (*d*), does not seem to have been cited, and his lordship's decision does not seem to be consistent with the judgment of Lord ELDON in that case, or with that of the Court of Appeal

(*b*) *Ex parte Grace*, 1 B. & P. 376; explained in *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40, at p. 58.

(*c*) *Re Thorpe*, *Vipont* v. *Radcliffe*, [1891] 2 Ch. 360.

(*d*) *James* v. *Dean*, 15 Ves. 236.

(*e*) *Eyre* v. *Dolphin*, 2 B. & B. 290; *Mill* v. *Hill*, 3 H. L. Cas. 828; *Yem* v. *Edwards*, 1 De G. & J. 598; *James* v. *Deane*, *supra*. The reader is also referred to *Re Payne's Settlement*, *Kibble* v. *Payne*, 54 L. T. 840; and *infra*, Art. 46.

(*f*) *Re Lord Ranelagh's Will*, 26 Ch. D. 590; *Phillips* v. *Phillips*, 29 Ch. D. 673.

(*g*) 76 L. T. 770. Strangely omitted from the authorised reports. See also *Holmes* v. *Williams*, W. N. (1895) 116.

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in the recent case of *Re Biss, Biss* v. *Biss* (*h*), where the whole subject was elaborately discussed.

Tenant for life receiving money in relation to inheritance.

Upon similar grounds, if a tenant for life accepts money in consideration of his allowing something to be done which is prejudicial to the trust property (as, for instance, the unopposed passage of an Act of Parliament sanctioning a railway), he will be a trustee of such money for all the persons interested under the settlement (*i*).

Other partial owners.

In the above cases the presumption against the validity of the renewal for the sole benefit of the party renewing is absolute and irrebuttable (*j*). But when we come to consider renewals by mortgagees (*k*), joint tenants (*l*), partners (*m*), and owners of land subject to a charge (*n*), the proposition requires modification. In such cases there is no irrebuttable presumption of law against the validity of the transaction, but at most a rebuttable presumption of fact, that it lies on the party renewing to show that he acted *bonâ fide*, and took no undue advantage of the other parties interested (*o*). If, therefore, on the evidence the court considers that there was no bad faith and no undue advantage taken, the renewer will be allowed to retain the benefit of the renewed lease. For instance, where a lease formed part of the personal estate of an intestate, and the lessor refused to renew to the administratrix, a subsequent renewal obtained by one of the next-of-kin was held to be unimpeachable (*o*).

(*h*) [1903] 2 Ch. 40.

(*i*) *Pole* v. *Pole*, 2 Dr. & S. 420.

(*j*) *Re Biss, Biss* v. *Biss, supra.*

(*k*) *Rushworth's Case*, Free. 13.

(*l*) *Palmer* v. *Young*, 1 Ver. 276. But dist.: *Holmes* v. *Williams*, W. N. (1895) 116, where ROMER, J., held that one of several beneficiaries who obtained a lease to himself of property previously leased to his trustees, and forfeited by them, was not a constructive trustee for the other *cestuis que* trusts.

(*m*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 311; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Bell* v. *Barnett*, 21 W. R. 119; but as to partners, see *Dean* v. *McDowell*, 8 Ch. D. 345; and *Piddocke* v. *Burt*, [1894] 1 Ch. 343, where a partner was held not to be a constructive trustee.

(*n*) *Jackson* v. *Welsh*, L. & G. *temp.* Plunk. 346; *Winslow* v. *Tighe*, 2 B. & B. 195; *Webb* v. *Lugar*, 2 Y. & C. 247.

(*o*) *Re Biss, Biss* v. *Biss, supra.*

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How far directors and other agents are constructive trustees of profits.

Directors of a company cannot avail themselves of their position to enter into beneficial contracts with the company (*p*); nor can they buy property, and then sell it to the company at an advanced price. Promoters of a company hold a fiduciary relation towards the company, and cannot be allowed to retain a secret commission received from the vendors of property which the company is formed for the purpose of purchasing (*q*). Directors cannot receive commissions from other parties on the sale of any of the property of the company (*r*); and generally they cannot deal for their own advantage with any part of the property or shares of the company (*s*).

Profits made by agents.

However, notwithstanding some *dicta* to the contrary, it would seem that where profits are illegally made by agents, although they must give them up to their principals, they are not always considered to be constructive trustees, so as to give the principals the right of following the profits if converted into other kinds of property. This question is considered more fully, *infra*, p. 141.

Solicitor buying from client.

A solicitor who purchases property from a client must, if the sale be impeached, not only show that he gave full value for it, but also that the client was actually benefited by the transaction (*t*). And persons who subsequently purchase from the solicitor with notice of the transaction are under a similar liability (*u*).

(*p*) *Great Luxembourg Rail. Co.* v. *Magnay*, 25 Beav. 586; *Aberdeen Rail. Co.* v. *Blackie*, 1 Macq. 461; *Flanagan* v. *Great Western Rail. Co.*, 19 L. T. 345.

(*q*) *Hitchens* v. *Congreve*, 1 R. & M. 150; *Fawcett* v. *Whitehouse*, *ibid.*, 132; *Beck* v. *Kantorowicz*, 3 Kay & J. 230; *Baynall* v. *Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918.

(*r*) *Gaskell* v. *Chambers*, 26 Beav. 360.

(*s*) *York, etc. Co.* v. *Hudson*, 16 Beav. 485.

(*t*) And see also *infra*, Art. 46.

(*u*) *Topham* v. *Spencer*, 2 Jur. (N.S.) 865.

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ART. 25.—*Constructive Trusts where Equitable and Legal Estates are not united in the same Person.*

In every case (not coming within the scope of any of the preceding articles) where the person in whom real or personal property is vested, has not the whole equitable interest therein, he is *pro tanto* a trustee of that property for the persons having such equitable interest (*x*).

Relation of vendor and purchaser before completion.

Thus, where a binding contract is entered into between two persons for the sale of property by one to the other, then, in the words of Lord CAIRNS, in *Shaw* v. *Foster* (*y*), "There cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor is a trustee of the property for the purchaser; the purchaser is the real beneficial owner in the eye of a court of equity of the property; subject only to this observation, that the vendor (whom I have called a trustee) is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que* trust subsists, but subsists subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." He is, therefore, only trustee *pro tanto*, and his duties are strictly matter of contract (*z*).

(*x*) This article, doubtless, includes all those relating to constructive trusts which have preceded it; but as it would be an endless task to enumerate every kind of constructive trust (for they are, as has been truly said, conterminous with equity jurisprudence), I have thought it better to call special attention to those classes which are most important, and to bring all others within one sweeping general clause.

(*y*) L. R. 5 H. L. 321; *Earl of Egmont* v. *Smith*, 6 Ch. D. 469.

(*z*) See *per* Lord WESTBURY in *Knox* v. *Gye*, L. R. 5 H. L. 656; distinguished in *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474; but see *Earl of Egmont* v. *Smith*, *supra*, and *cf. Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

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Vendor's lien after conveyance.

In the converse case, where the vendor has actually conveyed the property, but the purchaser has not paid the purchase-money, or has only paid part of it, the vendor has a lien upon the property for the unpaid portion (*a*); and the purchaser will hold the estate as a trustee *pro tanto*, unless by his acts or declarations the vendor has plainly manifested his intention to rely not upon the estate, but upon some other security, or upon the personal credit of the individual (*b*). A mere collateral security will not, however, suffice (*c*); but where it appears that a bond, covenant, mortgage or annuity was itself the actual consideration—the thing bargained for—and not merely a collateral security for the purchase-money (*d*), there will be no lien, and consequently no trust.

Equitable mortgages.

It need scarcely be pointed out that a mortgagor, in the case of an equitable mortgage, is *pro tanto* a trustee for the mortgagee. For even where there is no written memorandum, a deposit of title deeds is of itself evidence of an agreement for the mortgage of the property (*e*); and in accordance with the maxim, that "equity regards that as done which ought to be done," the mortgagor holds the legal estate in trust to execute a legal mortgage to the mortgagee.

Devolution of mortgaged property.

Upon the death of a mortgagee, the mortgaged property (if assured to him in fee) descended at law before 1882 to his heir; but being in reality only a security for money, it equitably belonged to his personal representatives, and the heir was, therefore, held to be a mere trustee for the administrators or executors of the mortgagee (*f*).

(*a*) *Mackreth* v. *Symmons*, 2 Wh. & Tu. 926.
(*b*) *Ibid.*
(*c*) *Collins* v. *Collins*, 31 Beav. 346; *Hughes* v. *Kearney*, 1 Sch. & L. 134.
(*d*) *Buckland* v. *Pocknell*, 13 Sim. 406; *Parrot* v. *Sweetland*, 3 My. & K. 655; *Dixon* v. *Gayfere*, 21 Beav. 118; *Dyke* v. *Rendall*, 2 D. M. & G. 209; and see *Re Brentwood Brick and Coal Co.*, 4 Ch. D. 562.
(*e*) *Russell* v. *Russell*, 2 Wh. & Tu. 76; *Ex parte Wright*, 19 Ves. 258; *Pryce* v. *Bury*, 2 Dr. 42; *Ferris* v. *Mullins*, 2 Sm. & Gif. 378; *Ex parte Moss*, 3 De G. & Sm. 599.
(*f*) *Thornborough* v. *Baker*, 2 Wh. & Tu. 1; but see 37 & 38 Vict. c. 78, ss. 4, 5.

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Mortgagee in possession.

So a mortgagee in possession is constructively a trustee of the rents and profits, and bound to apply them in a due course of administration (*g*). But there has been considerable conflict of opinion as to the extent of his responsibility. For instance, it has been held that he is liable even after transferring the mortgage without the mortgagor's consent (*h*); but this decision has been questioned, and, it is respectfully apprehended, rightly so (*i*). In another case, it was said that a mortgagee in possession who, after the mortgagor's death, bought up the widow's right to dower, was obliged to hold it in trust for the heir, upon his paying the purchase-money (*k*); and although this case has called forth much comment (*l*), it is difficult to distinguish it in principle from the class of cases considered in the last article.

Limited owners paying off charge on inheritance or calls on shares.

Another important illustration of the rule now under consideration occurs when a limited owner (*e.g.*, a tenant for life) pays off a specific (*m*) incumbrance out of his own money. In such a case (in the absence of evidence showing an intention to extinguish the incumbrance) he is held to be, in equity, in the positon of a transferee of the incumbrance, notwithstanding that he took on ordinary reconveyance (*n*); and, on his death, the remainderman holds the legal estate subject to the equitable lien or charge so created (*o*). On the same ground, it has been held that a tenant for life under a settlement comprising shares in a company, has a lien on the shares for repayment, with interest, of advances

(*g*) Lew. 169; *Coppring* v. *Cooke*, 1 Ver. 270; *Bentham* v. *Haincourt*, Pr. Ch. 30; *Parker* v. *Calcraft*, 6 Madd. 11; *Hughes* v. *Williams*, 12 Ves. 493; *Maddocks* v. *Wren*, 2 Ch. Rep. 109.

(*h*) *Venables* v. *Foyle*, 1 Ch. Cas. 3.

(*i*) Lew. 169; and consider *Kingham* v. *Lee*, 15 Sim. 400.

(*k*) *Baldwin* v. *Bannister*, cited in *Robinson* v. *Pett*, 3 P. Wms. 251.

(*l*) *Dobson* v. *Land*, 8 Hare, 330; *Arnold* v. *Garner*, 2 Ph. 231; *Matthison* v. *Clarke*, 3 Dr. 3.

(*m*) See *Morley* v. *Morley*, 25 L. J. Ch. 7; *e.g.* a Local Government charge, *Re Smith's Settled Estates*, [1901] 1 Ch. 689.

(*n*) *Lord Gifford* v. *Lord Fitzhardinge*, [1899] 2 Ch. 32.

(*o*) *Redington* v. *Redington*, 1 Ba. & B. 131; *St. Paul* v. *Dudley*, 15 Ves. 167; *Drinkwater* v. *Combe*, 2 S. & St. 340. As to case where tenant for life of a lease for lives purchases the reversion and settles it, see *Isaac* v. *Wall*, 6 Ch. D. 706; and, as to evidence showing contrary intention, see *Astley* v. *Milles*, 1 Sim. 298; *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244.

made at the request of the trustees, for the purpose of paying calls (*p*). Art. 25.

Improvements effected by partial owner.

In some cases, where a person partially interested in land has raised the value of it by effecting permanent improvements at his own expense, the amount expended or the additional value imparted to the property by the expenditure (whichever is the smallest sum), has been charged by the court on the property in favour of the party who found the money. But it is believed that this has only been done in two classes of cases, viz. (1) where equitable relief is being sought by the other parties interested in the estate; in which case such equitable relief has been given only on the terms of their doing equity by bearing the charge in question (*q*); and (2) in cases of salvage, *i.e.*, where the expenditure has been necessary to avoid actual loss (*r*). But except in such cases as these, it would seem that (except under the provisions of the Settled Land Acts or the Improvement of Land Act) the court has no jurisdiction either to sanction in advance a charge on the property of the expense of permanent improvements, or to create such charge where the partial owner has already incurred the expense (*s*). In such cases, however, Parliament has on several occasions given relief by private legislation.

Confidential agents.

Considerable difficulty frequently arises with regard to the question whether an agent is a trustee for his principal. The point generally arises either in reference to the Statutes of Limitation, or to the application of the Debtors Act, 1869 (32 & 33 Vict. c. 62), in relation to the attachment of defaulting trustees. It is submitted that where property is handed to an agent either for investment, sale, safe custody (*t*), or

(*p*) *Todd* v. *Moorhouse*, 19 Eq. 69.

(*q*) *Henderson* v. *Astwood*, [1894] A. C. 150; *Rowley* v. *Ginnever*, [1897] 2 Ch. 503; and see *Re Cook's Mortgage, Lawledge* v. *Tyndall*, [1896] 1 Ch. 923.

(*r*) *Re Montagu, Derbishire* v. *Montagu*, [1897] 2 Ch. 8; *Frith* v. *Cameron*, 12 Eq. 169; but see *Re Legh's Settled Estates*, [1902] 2 Ch. 274.

(*s*) *Re Montagu, supra*; and see *Floyer* v. *Bankes*, 8 Eq. 115; *Re Willis, Willis* v. *Willis*, [1902] 1 Ch. 15. As to improvements by trustees, see, *post*, Art. 48, and as to repairs, Art. 38.

(*t*) *Re Tidd, Tidd* v *Overell*, [1893] 3 Ch. 154; *North America Land, etc. Co.* v. *Watkins*, [1904] 1 Ch. 242.

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otherwise, then he is a trustee of that property (*u*). But where an agent merely collects rents, or debts, or the like on commission, or receives illicit commissions, the relation of trustee and *cestui que* trust does not generally arise, unless the agency is of an exceptionally fiduciary character; the remedy of the principal being confined to a common law action for money had and received (*x*). As CHITTY, J., said in *Piddocke* v. *Burt* (*x*), "it is not every agent who is fiduciary." Thus a partner who collected debts due to the firm, and misapplied the money so collected, was held not to be liable as a trustee. So directors of a company, although "they have been always considered and treated as trustees of money *which comes to their hands or which is under their control*," (*y*) are not liable as trustees for carelessness,—as for instance, for accepting shares in another company in lieu of cash (*y*). But on the other hand, an auctioneer is a trustee of a deposit paid to him (*z*); so is a broker of stock handed to him for sale (*a*). A solicitor to whom money is handed for investment (*b*), a solicitor of a mortgagee who receives purchase-moneys arising under an exercise of his client's power of sale (*c*), land agents, bailiffs, and receivers, are all fiduciary agents (*d*). But a solicitor employed to get in a debt, and who ought to hand it over *at once* to his client, is curiously enough not a trustee of it (*e*); possibly on the ground that he is not intended to keep it in his custody, custody being of the very essence of trusteeship.

(*u*) See *Burdick* v. *Garrick*, 5 Ch. App. 233; *Crowther* v. *Elgood*, 34 Ch. D. 691; *Dooby* v. *Watson*, 39 Ch. D. 178.

(*x*) *Piddocke* v. *Burt*, [1894] 1 Ch. 343; and see *Friend* v. *Young*, [1897] 2 Ch. 421, explained and distinguished in *North America Land, etc. Co.* v. *Watkins*, *supra*.

(*y*) *Per* LINDLEY, L.J., *Re Lands Allotment Co.*, [1894] 1 Ch., at p. 631; and see *Re Sharpe*, *Masonic, etc. Co.* v. *Sharpe*, [1892] 1 Ch. 154.

(*z*) *Crowther* v. *Elgood*, *supra*,

(*a*) *Ex parte Cooke*, *Re Strachan*, 4 Ch. D. 123.

(*b*) *Burdick* v. *Garrick*, 5 Ch. App. 233; *Dooby* v. *Watson*, *supra*; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

(*c*) *Re Bell*, *Lake* v. *Bell*, 34 Ch. D. 462.

(*d*) *Marris* v. *Ingram*, 13 Ch. D. 338.

(*e*) *Re Hindmarsh*, 1 Dr. & Sm. 129; *Burdick* v. *Garrick*, *supra*; *Watson* v. *Woodman*, 20 Eq. 721.

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Partnership liens.

So, again, where the plaintiff was induced by fraud of the defendant to purchase a share of his business, and to enter into partnership with him, and judgment was given for the rescission of the agreement and the dissolution of the partnership, it was held that the plaintiff was entitled in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities; and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he had made the payments (*f*).

So where one partner wrongfully sells the partnership securities, he is a trustee of the proceeds (*g*).

Property acquired by fraud.

Upon similar principles, a court of equity converts a party who has obtained property by fraud "into a trustee for the party who is injured by that fraud (*h*). But, that being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, or *malus animus*, is proved by the clearest and most indisputable evidence; it is impossible to supply presumption in the place of proof" (*i*).

Capital of company distributed *ultra vires*.

So where the shareholders of a company receive capital *ultra vires*, they are trustees of it for the company (*k*); and *a fortiori* the directors are liable as trustees who have misapplied trust funds (*l*).

(*f*) *Mycock* v. *Beatson*, 13 Ch. D. 384; and as to sale of land obtained by fraud, see *Rose* v. *Watson*, 10 H. L. Cas. 672; and see also *Aberaman Ironworks* v. *Wickens*, 4 Ch. App. 101.

(*g*) *Kendal* v. *Wood*, L. R. 6 Ex. 243.

(*h*) See *Booth* v. *Turle*, 16 Eq. 182; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*i*) *Per* Lord Westbury in *McCormick* v. *Grogan*, L. R. 4 H. L. 88. As to a person who has by fraud prevented a will being made in plaintiff's favour, see *Dixon* v. *Olmius*, 1 Cox, 414; and see also as to gifts made under undue influence to fiduciary persons, Art. 14, *supra*.

(*k*) *Russell* v. *Wakefield, etc. Co.*, 20 Eq. 474; *Moxham* v. *Grant*, [1900] 1 Q. B. 92.

(*l*) *Re Sharpe, Masonic, etc. Co.* v. *Sharpe*, [1892] 1 Ch. 154.

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Trust funds received by a stranger.

So, again, where a stranger to a trust receives money or property from the trustee which he knows (1) to be part of the trust estate, and (2) to be paid or handed to him in breach of the trust, he is a constructive trustee of it for the persons equitably entitled, but not otherwise (*m*). This question of the responsibility of third parties as constructive trustees is more fully discussed in Division IV., Chap. III., *infra*.

(*m*) *Barnes* v. *Addy*, 9 Ch. App. 244; *Re Spencer*, 51 L. J. Ch. 271; *Re Blundell*, *Blundell* v. *Blundell*, 40 Ch. D., at p. 381; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; *Re Barney*, *Barney* v. *Barney*, [1892] 2 Ch. 265.

DIVISION IV.

THE ADMINISTRATION OF A TRUST.

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CHAPTER I.

DISCLAIMER AND ACCEPTANCE OF TRUSTS.

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ART. 26.—*Disclaimer of a Trust.*

No one is bound to accept the office of trustee (*a*). Both the office and the estate may be disclaimed *before acceptance;* in the case of a married woman by deed (*b*), and in other

(*a*) *Robinson* v. *Pett*, 2 Wh. & Tu. 606.
(*b*) 8 & 9 Vict. c. 106, s. 7.

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cases by deed or by conduct tantamount to a disclaimer (*c*). The disclaimer should be made within a reasonable period, having regard to the circumstances of the particular case (*d*). Part of a trust cannot be disclaimed if other part be accepted (*e*).

Consent to undertake future trust not binding

Thus, even though a person may have agreed in the lifetime of a testator to be his executor, he is still at liberty to recede from his promise at any time before proving the will (*f*).

Methods of disclaiming.

A prudent man will, of course, always disclaim by deed, in order that there may be no question of the fact; but a disclaimer by counsel at the bar, or even by conduct inconsistent with acceptance, is sufficient (*g*). For instance, in *Stacey* v. *Elph* (*h*), a person, named as executor and trustee under a will, did not formally renounce probate until after the death of the acting executor, nor formally disclaim the trusts of the will; but he purchased a part of the real estate, and took a conveyance from the tenant for life, *and the heir-at-law in whom the estate could only vest by the disclaimer of the trust.* It was held, under these circumstances, that he had by his conduct disclaimed the office and estate of trustee under the will.

Deed of disclaimer not necessary.

In *Re Ellison's Trusts* (*i*), Sir W. PAGE-WOOD, V.-C., expressed some doubt whether a *freehold estate* could be disclaimed by parol, or otherwise than by deed; but his honour's attention does not appear, however, to have been called to *Stacey* v. *Elph*. Moreover in the more recent case of *Re Gordon*, *Roberts* v. *Gordon* (*k*), where real estate was devised to trustees upon trust to sell and to form a mixed fund consisting of the proceeds of such sale and of the

(*c*) *Stacey* v. *Elph*, 1 M. & K. 199; *Townson* v. *Tickell*, 3 B. & A. 31; *Beybie* v. *Crook*, 2 Bing. N. C. 70; *Bingham* v. *Glamorris*, 2 Moll. 253; and *Re Birchall*, *Birchall* v. *Ashton*, 40 Ch. D. 436.

(*d*) See *Doe* v. *Harris*, 16 M. & W. 522; *Paddon* v. *Richardson*, 7 De G. M. & G. 563; *James* v. *Frearson*, 1 Y. & C. C. C. 370.

(*e*) *Re Lord and Fullerton*, [1896] 1 Ch. 228. See *infra*, p. 149.

(*f*) *Doyle* v. *Blake*, 2 Sch. & L. 239.

(*g*) *Forster* v. *Dawber*, 8 W. R. 646.

(*h*) *Supra*.

(*i*) 2 Jur. (N.S.) 262.

(*k*) 6 Ch. D. 531.

testator's personal estate, and the trustees were also nominated executors, and renounced probate, and never acted in the trusts, it was held by Sir GEORGE JESSEL, M.R., that the renunciation of probate, coupled with the fact that the trustees had never assumed to act as such, was conclusive evidence of disclaimer. Lastly, in *Re Birchall*, *Birchall* v. *Ashton* (*l*), the Court of Appeal held that a trustee had by conduct disclaimed the office; and that having disclaimed the office, he must of necessity have also disclaimed the estate. Art. 26

ART. 27.—*Acceptance of a Trust.*

A person may accept the office of trustee expressly; or he may do so constructively by doing such acts as are only referable to the character of trustee or executor (*m*); or he may do so by long acquiescence.

Express acceptance.

A trustee expressly accepts the office by executing the settlement (*n*), or by making an express declaration of his assent (*o*).

Acceptance by acquiescence.

Permitting an action concerning the trust property to be brought in his name (*p*), or otherwise allowing the trust property to be dealt with in his name (*q*), is such an acquiescence as will be construed to be an acceptance of the office.

Acceptance by exercise of dominion.

So, exercising any act of ownership, such as advertising the property for sale, giving notice to the tenants to pay the rents to himself or an agent, or requesting the steward

(*l*) 40 Ch. D. 436.
(*m*) Spence, 918.
(*n*) *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 134.
(*o*) *Doe* v. *Harris*, 16 M. & W. 517.
(*p*) *Montford* (*Lord*) v. *Cadogan*, 17 Ves. 485.
(*q*) *James* v. *Frearson*, 1 Y. & C. C. C. 370.

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of a manor to enrol a deed in relation to the trust property, is sufficient to constitute acceptance of a trust (*r*).

Acceptance by taking out probate.

So, where the office of executor is clothed with certain trusts, or where the executor is also nominated the trustee of real estate under a will, he is construed to have accepted the office of trustee if he takes out probate to the will (*s*). And acceptance of the trusts of a will was, prior to 1882, constructive acceptance of the office of trustee of estates, devised thereby, of which the testator was trustee (*t*). Now, however, trust estates (except copyholds) cannot be so devised, but vest in the executors *virtute officii* (*u*).

Acceptance by conduct.

In *Conyngham* v. *Conyngham* (*x*), one Coleman was appointed trustee of a will, but he never expressly accepted the appointment. One of the trusts was in respect of the rents of a plantation then in lease to the testator's son. Coleman acted as the agent of the son, who was also heir-at-law, and received the rents of the estate from him. It was held that, by so interfering with the trust property, he could not repudiate the trust, and say that he merely acted as the son's agent. He received the rents; and it was incumbent on him, if he did not desire to act as trustee, to disclaim expressly, and not to leave himself at liberty to say he acted as trustee or not. It is, however, not every interference with trust property which will be construed as an acceptance of the office of trustee; for if such interference be *plainly* (not *ambiguously*) referable to some other ground, it will not operate as an acceptance (*y*). Nor (it has been said) will merely taking charge of a trust until a new trustee can be found, constitute, of itself, a constructive

(*r*) *Bence* v. *Gilpin*, L. R. 3 Ex. 76. As to acceptance of executorship by intermeddling, and its effect on subsequent *devastavit* by administrator, see *Doyle* v. *Blake*, 2 Sch. & Lef. 239.

(*s*) *Mucklow* v. *Fuller*, Jac. 198; *Ward* v. *Butler*, 2 Mol. 533.

(*t*) *Re Perry*, 2 Curt. 655; *Brooke* v. *Haynes*, 6 Eq. 25.

(*u*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30.

(*x*) 1 Ves. sen. 522.

(*y*) *Stacey* v. *Elph*, 1 M. & K. 199; *Dore* v. *Erevard*, 1 R. & M. 231; *Lowry* v. *Fulton*, 9 Sim. 115.

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acceptance (*z*). But it would be a highly dangerous act, even if that decision were now followed, which seems doubtful.

In a recent case, the joining in the legacy duty receipt for the trust fund, unaccompanied by the actual receipt of the money, was held to be of itself insufficient to fix the trustee with acceptance of the trusteeship (*a*).

Acceptance by long silence.

But where a trustee, with notice of the trust, has indulged in a passive acquiescence for some years, he will be presumed to have accepted it, in the absence of any satisfactory explanation (*b*).

Acceptance of part and attempted disclaimer of other part.

Lastly, acceptance of part of a trust is acceptance of the whole, notwithstanding any attempted disclaimer of part. Thus, where a testator having property here and abroad, gave the whole to trustees upon the same trusts, it was held that one of the trustees could not disclaim the English property while accepting the trusts of the foreign property; and that consequently he was a necessary party to a sale of the former (*c*).

(*z*) *Evans* v. *John*, 4 Beav. 35.
(*a*) *Jago* v. *Jago*, 68 L. T. 654.
(*b*) *Wise* v. *Wise*, 2 J. & Lat. 403; *Re Uniacke*, 1 J. & Lat. 1; *Re Needham*, *ibid.* 34.
(*c*) *Re Lord and Fullerton*, [1896] 1 Ch. 228.

CHAPTER II.

THE ESTATE OF THE TRUSTEE, AND ITS INCIDENTS.

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ART. 28.—*Cases in which the Trustee takes any Estate.*

(1) Where the trust is a simple trust, and the trust property is of freehold tenure, then, in consequence of (or in the case of wills by analogy to) the Statute of Uses, the trustee takes no estate unless the property be limited *to his use*, or unless there be a clear intention to vest an estate in him. But where the trust is a special trust, the statute does not apply, and the trustee will take a legal estate of some duration.

(2) Where the trust property is of copyhold or leasehold tenure, or is pure personalty, the Statute of Uses is inapplicable, and the trustee takes a legal estate of some duration, whether the trust be simple or special.

(3) This article has no application where the legal estate is outstanding.

Trust to permit beneficiary to receive rents.

Thus, where the legal estate in freeholds is limited to trustees, and the words used are "in trust to pay to" a specified person the rents and profits, there the trustees

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take the legal estate, because they must receive before they can pay. But where the words are "in trust to permit and suffer A. B. to take the rents and profits," there the legal estate passes directly to the party beneficially entitled, the purposes not requiring that it should remain in the trustees (*a*).

Trust to permit beneficiary to receive net rents.

Where, however, the trustees are to permit and suffer the beneficiary to receive the *net* or clear rents and profits, the trustees take the legal estate; it being presumed that the trustees are to take the *gross* rents, and after payment of outgoings, to hand over the *net* rents to the beneficiary (*b*).

Trust to pay or permit beneficiary to receive.

Where the language is ambiguous, and may be read either as implying a simple or a special trust, it has been said that the question must be determined according to the general rules of construction. Thus, in *Doe* v. *Biggs* (*c*), it was decided that the words "to pay or permit him to receive" would, if contained in a deed, create a special trust, inasmuch as of two inconsistent expressions in a deed the first prevails; whereas the same words occurring in a will would create a simple trust, as a testator's last words are preferred. However, this case cannot be relied on. As LINDLEY, L.J., said in a recent case (*d*), "I do not think it is a sensible decision. I do not think that case could be possibly so decided now if the question arose for the first time; and I am not disposed to extend it. On the other hand, I do not wish to shake titles; and I shall do precisely what our predecessors have always done—leave the case where it is." BOWEN, L.J., went even further, saying, "I agree with the late Master of the Rolls that the case is not one the precedent of which is really applicable to other cases. In most cases, *there is sure to be a context which displaces the conclusion at which the court arrived in that instance.*" The reader is therefore warned that *Doe* v. *Biggs*

(*a*) *Per* PARKE, J., *Barker* v. *Greenwood*, 4 M. & W. 429; *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109; *Doe* v. *Bolton*, 11 A. & E. 188.
(*b*) *Barker* v. *Greenwood*, *supra*; *White* v. *Parker*, 1 Bing. N. C. 573; *Shapland* v. *Smith*, 1 Bro. C. C. 75.
(*c*) 2 Taunt. 109; *Baker* v. *White*, 20 Eq. 166, 171.
(*d*) *Re Lashmar*, *Moody* v. *Penfold*, [1891] 1 Ch. 258; and see *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

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cannot be safely relied upon as a precedent. Nevertheless it was recently followed by STIRLING, J., in *Re Adams and Perry* (*e*).

Control or discretion in trustees.

So, again, where the trustees are to exercise any control or discretion they take some estate. For instance, where the beneficiary is empowered to give receipts for the rents with the *approbation* of the trustees (*f*); or the trust is for the separate use of a married woman (in cases where the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), does not apply), who consequently requires protection, the trustees take the legal estate (*g*); at all events, where the trust is created by will. But where it was created by deed the common law courts, not recognizing the separate estate of a *feme covert*, held that such a trust was a simple trust, and therefore came within the Statute of Uses (*h*). However, it seems more than questionable whether, having regard to the Judicature Acts, this would now be followed. It is, however, apprehended that in cases to which the Married Women's Property Act applies the trustee would now take no legal estate, because the power of the husband no longer exists.

Charge of debts.

Where property was devised to trustees charged with payment of debts, and subject thereto in trust for A., there, as the trustees were not directed *to pay* the debts, they had no duties, and consequently took no estate (*i*). It is, however, suggested that in the case of wills coming into operation since Lord St. Leonard's Act (22 & 23 Vict. c. 35, s. 14), this might not be so, as in such cases that Act casts the duty of selling the property on the trustees. Anyhow, they always took the legal estate if they had to pay the debts (*k*).

(*e*) [1899] 1 Ch. 554.

(*f*) *Gregory* v. *Henderson*, 4 Taunt. 772; and see also *Davies to Jones and Evans*, 24 Ch. D. 190, where a legal estate was implied without any devise to the trustees. But *cf. Re Cameron, Nixon* v. *Cameron*, 26 Ch. D. 19.

(*g*) *Harton* v. *Harton*, 7 T. R. 652. But query whether this would be so since the Married Women's Property Act, 1882.

(*h*) *Williams* v. *Waters*, 14 M. & W. 166; see *Nash* v. *Allen*, 1 H. & C. 167.

(*i*) *Kenrick* v. *Lord W. Beauclerk*, 3 B. & P. 175.

(*k*) *Smith* v. *Smith*, 11 C. B. (N.S.) 121; *Marshall* v. *Gingell*, 21 Ch. D. 790; and see as to what amounts to a direction *to the*

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In *Houston* v. *Hughes* (*l*), it was held that (notwithstanding the Statute of Uses), under a devise of freeholds and copyholds to A. and his heirs, in trust for B. and his heirs, the circumstance that A. took an estate in the copyholds was an argument in favour of an intention that he should take the legal estate in the freeholds. However, this doctrine was dissented from by JESSEL, M.R., in *Baker* v. *White* (*m*), and it is clear that even if it could be supported in the case of a will, a similar limitation in a deed would be construed far more strictly.

Freeholds or copyholds in one trust.

So, where lands are devised unto and *to the use* of trustees in trust for B., the trustees take the legal estate irrespective of any active trust (*n*).

Devise to the use of trustees.

Again, even where the active trust is of a trivial description, yet, if it implies an intention to vest the legal estate in the trustee, effect will be given to that intention. Thus, if a testator devises Greenacre to A. and B. and their heirs, upon trust forthwith *to convey and assure* the same to C. in fee, A. and B. will take the legal estate, for they have an active duty to perform, viz., to convey it to C. (*o*).

Trust to convey to beneficiaries.

A devise to trustees upon trust for A. for life, with remainder to B. in fee, followed by a *power* to sell, lease, or mortgage, vests the legal estate in the trustees, for the exercise of the power might become an active duty (*p*).

Power of sale given to trustee.

trustees to pay debts, *Spence* v. *Spence*, 10 W. R. 605; *Creaton* v. *Creaton*, 3 Sm. & G. 386; and *Re Brooke*, *Brooke* v. *Brooke*, [1894] 1 Ch. 43.

(*l*) 6 B. & C. 403.

(*m*) 20 Eq. 166; approved by STIRLING, J., in *Re Townsend's Contract*, [1895] 1 Ch. 716.

(*n*) *Doe* v. *Field*, 2 B. & Ad. 564.

(*o*) *Doe* d. *Shelley* v. *Edlin*, 4 A. & E. 582; *Doe* d. *Noble* v. *Bolton*, 11 A. & E. 188; *Van Grutten* v. *Foxwell*, [1897] A. C. 658. Even where the tenant for life is to *receive* the rents, *Keen* v. *Deardon*, 8 East, 248.

(*p*) *Watson* v. *Pearson*, 2 Exch. 581; *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 636.

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ART. 29.—*The Quantity of Estate taken by the Trustee of Lands.*

Whenever, under the preceding article, a trustee takes a legal estate of some kind in land, the quantity of that estate is determined by the following principles:

(a) If the settlement is a deed, it will be construed strictly, and the estate of the trustee will not be enlarged or diminished by any reference to the exact estate required to carry out the trust (*q*), unless a strict construction would lead to an inconsistency (*r*).

(b) If the settlement is a will dated before the Wills Act, 1837 (1 Vict. c. 26), the legal estate given to a trustee will be enlarged or diminished to such an estate as will enable him to perform the trusts; and if no words of limitation are used, the estate will be limited to a definite or indefinite term of years, unless the trust requires the trustee to take the fee (*s*).

(c) If the settlement is a will executed since the Wills Act, an indefinite devise to a trustee *primâ facie* passes the fee simple, or other the whole estate of the testator;

(*q*) *Cooper* v. *Kynock*, 7 Ch. App. 398; *Blaker* v. *Anscombe*, 1 B. & P. (N. R.) 25; *Venables* v. *Morris*, 7 T. R. 342; *Wykham* v. *Wykham*, 18 Ves. 395, *per* ELDON; *Colmore* v. *Tyndall*, 2 Y. & J. 605. If a sufficient estate be not given to the trustee, it is conceived that it would be ground for rectification (see *Re Bird*, 3 Ch. D. 214).

(*r*) *Curtis* v. *Price*, 12 Ves. 89; *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198.

(*s*) *Cordall's Case* Cro. Eliz. 316; *Doe* v. *Simpson*, 5 East, 162; *Ackland* v. *Lutley*, 9 A. & E. 879; *Heardson* v. *Williamson*, 1 Kee. 33; *Doe* v. *Nichols*, 1 B. & C. 336; *Watson* v. *Pearson*, 2 Ex. 581; *Bush* v. *Allen*, 5 Mod. 63; *Doe* v. *Homfray*, 6 A. & E. 206.

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and if the trusts by their nature extend over an indefinite period, that presumption is irrebuttable. But if, on the face of the will, it is apparent that an estate *pur autre vie* would certainly enable the trustee to fulfil all the trusts, he will take that estate only, notwithstanding a limitation to him and his heirs, unless there is a clear intention expressed that he shall take the fee or some other defined estate (*t*).

SUB-PARAGRAPH (a).

Gift by deed to trustees and their heirs.

In *Colmore* v. *Tyndall* (*u*), under a deed, lands were limited to the use of A. for life, with remainder to the use of B. and his heirs during the life of A., to support contingent remainders, remainder to the use of C. for life, remainder to the same B. and his heirs during the life of C. to support contingent remainders, remainder to the first and

(*t*) Sub-paragraph (c) of this article is intended and believed to give the effect of ss. 30 and 31 of the Wills Act (1 Vict. c. 26). By the first of these sections it is enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall be given to him expressly or by implication. Section 31 enacts, that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied. Both these sections have been subjected to much criticism, and, strange and almost incredible as it may appear, it is believed that the real history of the two sections is, that they were drafted as alternative ones, but, by some carelessness, were both allowed to remain in the Act when passed (see *per* JESSEL, M.R., *Freme* v. *Clement*, 18 Ch. D. 514). Their meaning is by no means clear; but it is apprehended that their effect is as above stated (see Lew. 217; 2 Jar. Wills, 321; Hawkin's Wills, 30).

(*u*) 2 Y. & J. 605; and see also *Cooper* v. *Kynock*, 7 Ch. App. 398; and *Re White and Hindle's Contract*, 7 Ch. D. 201.

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other sons of C. in tail male, remainder to divers other uses, remainder to the said B. and his heirs (without saying during the life of the tenant for life) to support and preserve contingent remainders, with divers remainders over. The question arose whether, under the last limitation to B. and his heirs, he took the fee simple, or whether he only took that which was necessary for the purpose of the trust, namely, an estate *pur autre vie*. But the court held that although the estate given to the trustee seemed to be larger than was essential to its purpose, it was not a sufficient ground for restricting an estate limited *by deed* to a trustee *and his heirs*, to an estate for life.

Inconsistent limitations.

But even in a deed, where there are limitations which, on a strict construction, would be inconsistent and repugnant, the court will, by supplying obviously omitted words, endeavour to carry out the intention. Thus in *Curtis* v. *Price* (*x*), the facts were as follows. A deed of settlement purported to convey freeholds to P. and J. and their heirs, to the use of M. for life; remainder to the use of E. (his wife) during widowhood; but if she should marry again, *to the use of P. and J. and their heirs*, in trust out of the rents to pay E. an annuity, and to apply the residue to the maintenance of the children of M. and E.; with remainder, after the decease of the survivor of M. and E., *to the use of P. and J. for* 1,000 *years*, upon divers trusts. It was held that, as the limitation of the 1,000 years' term to P. and J. was absolutely inconsistent with an intention to give them the fee, the limitation to them and their heirs must be cut down to an estate during the life of E.

SUB-PARAGRAPHS (b), (c).

Gift by will to trustees and their heirs.

If the limitations stated in *Colmore* v. *Tyndall* (*supra*), had been declared by a will, whether executed before or since the Wills Act, 1837 (1 Vict. c. 26), instead of by a deed, the decision would clearly have been different. Thus, if lands are devised to trustees and their heirs, upon trust

(*x*) 12 Ves. 89; and see *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198.

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to pay the *net* rents to A. for life, and after A.'s death in trust for B., the trustees, notwithstanding the words of inheritance, only take an estate *pur autre vie* (viz., during A.'s life); for the active trust reposed in them ends with the life of A., and consequently the purposes of their trust do not require them to take a larger estate (*y*).

Larger estate not implied to rectify testator's mistake.

Nor will the court imply a larger estate (where it is not necessary to carry out the definite *trusts* of the will), on the ground that by doing so effect would *incidentally* be given to the testator's intentions. Thus, if freeholds be given to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the heirs of A., it is obvious that if the trustees could be held to take the fee in reversion expectant on A.'s life estate, the rule in *Shelley's Case* would be rendered inapplicable, and the obvious intention of the testator to give A. a mere life interest would be preserved. But notwithstanding this, the court holds that the trustees only take an estate *pur autre vie*, that being sufficient to enable them to preserve contingent remainders, which alone was the object of the trust reposed in them (*z*).

Estate in trustee to preserve contingent remainder not implied.

On similar grounds, the court will not imply a larger estate in the trustees than the trust requires, merely because, if they took such larger estate, it would support a contingent remainder, and so prevent it from failing for want of a particular estate of freehold (*a*).

Direction to pay rents to married women.

On the other hand, where, by will, the rents of certain lands (which are not expressly devised to anyone) are directed to be paid to a married woman's separate use by the testator's executors, there is an implied devise to the executors of such an estate in the land as will enable them to execute the trust (*b*), viz., an estate *pur autre vie*.

(*y*) *Blagrave* v. *Blagrave*, 4 Ex. 550; *Watson* v. *Pearson*, 2 Ex. 581; *Doe* v. *Cafe*, 7 Ex. 675.

(*z*) *Nash* v. *Coates*, 3 B. & Ad. 839; *Haddesley* v. *Adams*, 22 Beav. 266.

(*a*) *Cunliffe* v. *Brancker*, 3 Ch. D. 393, and cases there cited; *Festing* v. *Allen*, 12 M. & W. 279; *Marshall* v. *Gingell*, 21 Ch. D. 790.

(*b*) *Bush* v. *Allen*, 5 Mod. 63; *sed quære* since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

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Trusts requiring a fee simple imply that estate.

So if land be devised to trustees, without any words of limitation, by a will executed since the Wills Act, 1837 (1 Vict. c. 26), and they are expressly directed to sell (*c*), or impliedly authorised to do so (*d*) (as by a direction to pay debts (*e*)), whether certainly or contingently, or are authorised to lease or to mortgage (*f*), or to allow maintenance to infants during a period of suspended vesting (*g*), or to do any other act which requires the complete control over the property (*h*), the trustees will take an estate in fee simple, or other the whole estate which the testator could dispose of. With regard, however, to wills executed before the Wills Act, 1837, this would not have been so except under a direction *to sell* (*i*): for a trust to mortgage or lease, or a trust to maintain infants, could equally have been carried out by a trustee who had merely an indefinite term of years (*k*).

Clear intention to vest fee, although not required for trust.

And so, too, the trustees will take the fee simple where there is a clear intention to give it them, notwithstanding that a less estate would certainly enable them to perform the trust. Thus, if lands be devised unto and *to the use* of A. and his heirs, in trust for B. and his heirs, A. takes the legal fee simple (*l*), because there can be no other meaning given to the words used. But a devise unto and to the use of A. and his heirs, in trust for A. for life, and after A.'s death a direct devise to C., gives the trustees merely an estate during the life of A. (*m*); for the remainder is not limited by way of trust.

(*c*) *Shaw* v. *Weigh*, 2 Str. 798; *Bagshaw* v. *Spencer*, 1 Ves. sen. 144; *Watson* v. *Pearson*, 2 Ex. 581; *Cropton* v. *Davies*, L. R. 4 C. P. 159.

(*d*) *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485.

(*e*) *Marshall* v. *Gingell*, *supra*; *Re Brooke*, *Brooke* v. *Brooke*, [1894] 1 Ch. 43; but see *Carlyon* v. *Truscott*, 20 Eq. 348.

(*f*) *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 636; *Watson* v. *Pearson*, *supra*; *Doe* v. *Willan*, 2 B. & Ald. 84; *Re Eddel's Trust*, 11 Eq. 559.

(*g*) *Berry* v. *Berry*, 7 Ch. D. 657; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

(*h*) *Villiers* v. *Villiers*, 2 Atk. 72.

(*i*) *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 636.

(*k*) See *Cordall's Case*, Cro. Eliz. 316; *Doe* v. *Simpson*, 5 East, 162; *Ackland* v. *Lutley*, 9 A. & E. 879; *Heardson* v. *Williamson*, 1 Kee. 33.

(*l*) *Doe* v. *Field*, 2 B. & Ad. 564.

(*m*) *Doe* d. *Woodrock* v. *Barthrop*, 5 Taunt. 382.

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So where there was a devise of freeholds and copyholds to trustees and *their heirs*, in trust for A. for life for her separate use, and after her death upon trust *to stand seised* of them for such persons as she should by will appoint, with a direct devise of the properties to A. in fee in default of appointment, it was held that the trustees took the legal estate in fee. And STIRLING, J., intimated that even if the power of appointment had not been executed he should have held that the ultimate gift to A. in fee was equitable, and not an executory legal devise (*n*).

Trust to convey to another.

Where a testator devises property to trustees and their heirs, upon trust to pay the net rents to A. for life, and after his death upon trust to convey the property to B. in fee simple, the direction to convey constitutes a special and active trust, which necessarily implies that the trustees should have the legal fee in them; for *non dat qui non habet* (*o*).

Recurring trusts.

Again, where there are recurring trusts which require the legal estate to be in the trustees, with intervening limitations which, taken alone, would vest the legal estate in the persons beneficially entitled, and there is *no repetition before each of the recurring trusts* of the gift of the legal estate to the trustees; then the legal estate is held to be in the trustees throughout, and the intermediate estates are equitable only (*p*). To show the importance of this principle, it is well to refer to the leading case of *Harton* v. *Harton* (*p*). There the limitations were to trustees, in trust for A. for life for her separate use, remainder to the heirs of her body, remainder to B. for life for her separate use, with remainder to the heirs of *her* body. Here the separate use gave the trustees an estate during A.'s life, and also during B.'s life; but had it not been for this last trust, they would not have taken the legal estate during the intermediate trust in favour of the heirs of A.'s body. As, however,

(*n*) *Re Townsend's Contract*, [1895] 1 Ch. 716.
(*o*) *Doe* d. *Shelley* v. *Edlin*, 4 A. & E. 582; *Doe* d. *Noble* v. *Bolton*, 11 A. & E. 188.
(*p*) *Harton* v. *Harton*, 7 T. R. 652; *Hawkins* v. *Luscombe*, 2 Sw. 375; *Brown* v. *Whiteway*, 8 Hare, 145; *Toller* v. *Attwood*, 15 Q. B. 929.

Art. 29. there was a recurring trust, they did so: and, therefore, as the estate of A., and the estate given to the heirs of her body, were both equitable estates, the rule in *Shelley's Case* applied, and A. took an estate tail. *Harton* v. *Harton* has been lately followed by the House of Lords in *Van Grutten* v. *Foxwell* (*q*), where precisely the same point arose.

In *Collier* v. *Walters* (*r*) a testator, by will dated before the Wills Act, 1837 (1 Vict. c. 26), devised his estate to trustees and their heirs, upon trust that they and their heirs should stand seised of the same during the life of W. C., and also until the whole of the testator's debts and the legacies thereinafter mentioned were paid; upon trust to let the same, and apply the rents in discharge of his debts; after payment of which, they were to apply the rents in payment of legacies, and finally hold the property upon trust to pay the rents to W. C. and his assigns during his life. And after the decease of W. C. and payment of the debts and legacies and all expenses, the testator *devised* the property to the heirs of the body of W. C., with remainders over. In 1880, W. C., relying on the rule in *Shelley's Case*, suffered a common recovery and barred the entail. Upon his right to do this coming in question, Sir GEORGE JESSEL, M.R., held, that the trustees took the legal fee, and that consequently, W. C., under the rule in *Shelley's Case*, took an equitable estate tail.

ART. 30.—*Bankruptcy of the Trustee.*

(1) The property of a bankrupt divisible among his creditors does not comprise property held by him as trustee for any other person (*s*), notwithstanding that it is property in his order

(*q*) [1897] A. C. 658.
(*r*) 17 Eq. 262.
(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. It may be conveniently mentioned here that on the conviction of a trustee the trust property does not vest in the administrator appointed under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23). See Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.

and disposition at the commencement of the bankruptcy (*t*). Art. 30.

(2) If he has converted it into money or other property, which would be subject to the trust in the hands of the trustee, it will remain so subject notwithstanding the trustee's bankruptcy (*u*).

The only part of this rule which requires any illustration is sub-clause (2); but as the doctrine of following trust property into other property into which it has been converted is fully treated of hereafter, the reader is referred to Art. 82 (*infra*).

ART. 31.—*The Incidents of the Trustee's Estate at Law.*

At law, the estate of the trustee is subject to the same incidents as if he were also beneficial owner, except where such incidents are modified by statute.

Power to commence actions.

Thus, he is the proper person to bring actions arising out of wrongs formerly cognizable by common law courts, and which necessitated the possession of the legal estate in those bringing them (*x*).

Curtesy and dower

So, at law, the estate of the trustee in real property was liable to curtesy (*y*), dower (*a*), and, if of copyhold tenure, to freebench (*b*); but of course the persons so taking could

(*t*) *Ex parte Barry, Re Fox*, 17 Eq. 113; *Ex parte Marsh*, 1 Atk. 158. As to constructive trustees, see *Ex parte Pease*, 19 Ves. 46, and *Whitfield* v. *Brand*, 16 M. & W. 282.

(*u*) *Frith* v. *Cartland*, 2 H. & M. 417; *Re Hallett's Estate, Knatchbull* v. *Hallett*, 13 Ch. D., at p. 719.

(*x*) *May* v. *Taylor*, 6 M. & G. 261; and see R. S. C., 1883, O. 16, r. 8.

(*y*) *Bennet* v. *Davis*, 2 P. Wms. 316.

(*a*) *Noel* v. *Jeron*, Fre. 43; *Nash* v. *Preston*, Cro. Car. 190.

(*b*) *Hinton* v. *Hinton*, 2 Ves. sen. 631.

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only take as trustees for those beneficially entitled (*c*). Since the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the devolution of freehold trust estates is entirely changed, and dower and curtesy no longer attach. Formerly the estate of a trustee was also liable to forfeiture and escheat, but there can no longer be forfeiture or escheat of a trust estate (*d*).

Trustees of copyholds must be admitted.

So, again, trustees of copyholds who take an *estate* must be admitted by the lord of the manor on the customary terms (*e*).

Trustees proof in bankruptcies.

Where a debtor to the trust estate becomes bankrupt, the trustee is the proper person to prove without the concurrence of the beneficiaries (*f*), unless in the case of a simple trust. Where, however, it is probable that the debtor has paid the beneficiaries direct, it lies in the discretion of the judge to require their concurrence in the proof (*g*).

Trustee liable for rates.

The trustee of a private trust is, as legal owner, liable to be rated in respect of the trust property (*h*).

Trustee of a business liable to creditors.

If the trustee, in pursuance of the trust, carry on a business for the benefit of the beneficiaries, he will yet be personally liable to the creditors of the business (*i*), and may be made a bankrupt (*k*).

Trustee entitled to custody of deeds.

A trustee in whom the legal estate is vested is entitled to the custody of the deeds (*l*); but the beneficiaries are entitled, at all reasonable times, to inspect them (*m*).

(*c*) *Noel* v. *Jevon*, *supra*: *Lloyd* v. *Lloyd*, 4 Dr. & War. 354.
(*d*) 13 & 14 Vict. c. 60, s. 46; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.
(*e*) *Wilson* v. *Hoare*, 2 B. & Ad. 350.
(*f*) *Ex parte Green*, 2 Dea. & Ch. 116.
(*g*) *Ex parte Dubois*, 1 Cox, 310; *Ex parte Gray*, 4 Dea. & Ch. 778.
(*h*) *R.* v. *Sterry*, 12 A. & E. 84; *R.* v. *Stapleton*, 4 B. & S. 629.
(*i*) *Farhall* v. *Farhall*, 7 Ch. App. 123; *Owen* v. *Delamere*, 15 Eq. 134. But of course he has a right to indemnity, as to which see Art. 64, *infra*.
(*k*) *Wightman* v. *Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 110; *Farhall* v. *Farhall*, *supra*. See, *infra*, Art. 63.
(*l*) *Evans* v. *Bicknell*, 6 Ves. 174.
(*m*) *Wynne* v. *Humberston*, 27 Beav. 421.

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On the other hand, the ordinary legal incident of voting for members of Parliament does not belong to the trustee in respect of the trust estate, as the Act 6 & 7 Vict. c. 18, s. 74, confers that right on the beneficiary.

Not entitled to exercise franchise.

ART. 32.—*Trustee's Estate on Total Failure of Beneficiaries.*

(1) Where a trust does not exhaust the whole of the trust property, and there is no one in whose favour it can result, it is now held in trust for the Crown (*n*).

(2) Where, however, the person to whom it would have resulted died before August 14th, 1884, intestate, and without an heir, and the trust property was real estate, it devolved beneficially on the trustees in whom the legal estate was vested, absolutely (*o*).

Former law as to realty before August, 1884

In the leading case of *Burgess* v. *Wheate* (*o*), the settlor conveyed real estate unto and to the use of trustees, in trust for herself, her heirs and assigns, to the intent that she should appoint, and for no other use whatever. She subsequently died without having appointed, and without heirs; and it was held that, there being holders of the legal estate —namely, the trustees—the Crown could not claim by escheat; and that the trustees (no person remaining who could sue them in equity) retained, as the legal proprietors, the beneficial interest also.

Devise of equitable interest to another set of trustees.

But if the settlor in the last case had appointed or devised her equitable interest to C., in trust for purposes which could not take effect; then, as between the original

(*n*) As to personal estate, see *Taylor* v. *Haygarth*, 14 Sim. 8; *Middleton* v. *Spicer*, 1 B. C. C. 201; and as to real estate, see 47 & 48 Vict. c. 71, s. 4.

(*o*) *Burgess* v. *Wheate*, 1 Eden. 177; and *Re Lashmar*, *Moody* v. *Penfold*, [1891] 1 Ch. 258.

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trustees and C., the latter would be entitled to the property as the nominee under the will. The court would, as between those parties, only carry out the testator's directions, and would not inquire how far the directions could be executed in their integrity (*p*).

Old law applied to constructive trustees.

The rule also applied to a constructive trustee. Thus, a mortgagee in fee, whose mortgagor died intestate and without heirs, took the property absolutely, subject to the mortgagor's debts (*q*). Whether this would have been the case if the mortgagee had been a mere equitable mortgagee seems to be more doubtful; but it is submitted that, on the principle of *Onslow* v. *Wallis* (*p*), the result would have been the same as if he were the legal mortgagee.

New law.

However, the foregoing illustrations have no application where the person to whom the property would have resulted has died, without heirs and intestate, since August 14th, 1884. For by the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, it is enacted that—

"From and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

(*p*) *Onslow* v. *Wallis*, 1 Mac. & G. 506; and see *Jones* v. *Goodchild*, 3 P. Wms. 33.

(*q*) *Beale* v. *Symonds*, 16 Beav. 406.

CHAPTER III.

THE TRUSTEE'S DUTIES.

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ART. 33.—*Duty of Trustee on acceptance of Trust.*

A trustee must acquaint himself, as soon as possible, with the nature and circumstances of the trust property, the terms of the trust, and the contents of the documents handed over to him relating to the trust. Where necessary, he should obtain a transfer of the trust property to

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himself, and (subject to the provisions of the settlement) get in trust money invested on insufficient or hazardous security (*a*).

Inquiries as to the property and the trusts and the trust documents.

A person who undertakes to act as a trustee, takes upon himself serious and onerous duties; and when, as too often happens, he adopts a "policy of masterly inactivity," he entirely misapprehends the nature of the office to which he has been appointed. As KEKEWICH, J., said, in *Hallows* v. *Lloyd* (*b*), "What are the duties of persons becoming new trustees of a settlement? Their duties are quite onerous enough, and I am not prepared to increase them. I think that when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers, to ascertain what notices appear among them of incumbrances and other matters affecting the trust."

Inquiries as to acts of predecessors.

They should further ascertain that the trust fund is properly invested, and that their predecessors have not committed breaches of trust which ought to be set right. For if, through not inquiring into such matters, the trust estate should suffer, a new trustee may be liable; although he himself took no part, and could have taken no part, in committing the original breaches of trust (*c*). It would seem, however, that where the old trustees had claims against third parties (*e.g.*, against their solicitor for negligence), the new trustees cannot sue the third parties but must go to the court for directions (*d*).

Effect of not searching for notices of incumbrances.

A new trustee is liable to make good moneys which he may have honestly paid to a beneficiary, if the papers relating to the trust comprise a notice of an incumbrance created by that beneficiary. For if the trustee had

(*a*) *E.g.*, in trade: *Kirkman* v. *Booth*, 11 Beav. 273.
(*b*) 39 Ch. D., at p. 691. Precisely the same duties are binding on persons appointed *original* trustees.
(*c*) *Harvey* v. *Olliver*, 57 L. T. 239; and see *Millar's Trustees* v. *Polson*, 34 Sc. L. R. 798.
(*d*) *Plaskitt* v. *Eddis*, 79 L. T. 136.

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acquainted himself, as he was bound to do, with the trust documents and papers, he would have found what the true state of the case was (*e*). Where, however, no amount of search would have disclosed the notice, the trustee would of course not be liable, as his liability entirely depends upon his shirking the duty of search, which the law casts upon him (*e*). For trustees are not insurers, and their conduct ought to be judged with reference to the facts and circumstances existing at the time when they have to act, and which either are known *or ought to be known* by them at that time (*f*). Moreover, he is not bound to inquire of the old trustees whether they have received notice of any incumbrances (*g*). Nor is he liable if he honestly, but erroneously (*e.g.*, from forgetfulness), informs an intended incumbrancer that he has no knowledge of any prior incumbrance (*h*).

Must not allow property to remain under sole control of co-trustee.

A trustee who leaves the trust fund in the sole name, or under the sole control, of his co-trustee, will be liable if it be lost (*i*).

Should invest money so soon as possible.

A trustee who keeps money for an unreasonable length of time without investing it, is liable if it be lost, however pure his motives may have been (*k*).

Art. 34.—*Duty of Trustee to obey the Directions of the Settlement unless Deviation sanctioned by the Court.*

(1) A trustee must obey the lawful directions of the settlement if practicable, except so far as these directions are modified by the consent of all the beneficiaries collectively.

(*e*) See *Hallows* v. *Lloyd*, 39 Ch. D. 686.
(*f*) *Re Hurst, Addison* v. *Topp*, 67 L. T. 96; *Youde* v. *Cloud*, 18 Eq. 634.
(*g*) *Phipps* v. *Lovegrove*, 16 Eq. 80.
(*h*) *Low* v. *Bouverie*, [1891] 3 Ch. 82.
(*i*) *Lewis* v. *Nobbs*, 8 Ch. D. 591.
(*k*) *Moyle* v. *Moyle*, 2 R. & M. 710.

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(2) Where, however, there arises an emergency or state of circumstances not foreseen or anticipated by the settlor, which renders it desirable that the strict terms of the trust should be departed from in order to prevent obvious injury to the beneficiaries, the court has jurisdiction to sanction such departure (*l*); but (*semble*) it has no corresponding power to sanction a departure merely in order to render the trust more profitable to the beneficiaries (*m*).

PARAGRAPH (1).

This is the most important of all the rules relating to the duties of trustees. It is founded on common sense, and overshadows and modifies all other rules, which must be read as if they contained an expressed declaration that they are subject to any provisions to the contrary contained in the settlement itself. As will be seen, however, in Article 55, the rule is subject to modification, if all parties beneficially interested are *sui juris*, and concur in putting an end to or amending the trust. For the beneficiaries collectively, being the only parties beneficially interested, are entitled, at any moment, to depose the trustee, and distribute the trust property between themselves as they may think fit. The rule is also, as we have seen (*n*), not binding upon a trustee where the directions of the settlement are illegal. Another exception necessarily arises where the directions of the settlement are impracticable (*e.g.*, if it directs an immediate sale, and no purchaser can be found).

Neglect to purchase or sell where directed to do so.

If trustees are, by the settlement, directed to call in trust moneys, and to lay them out on a purchase, and they fail to do so, and the fund is lost, they are liable for the loss (*o*). Similarly if a trustee for sale omits to sell property when it

(*l*) *Re Noe*, [1901] 2 Ch. 534, as modified by *Re Tollemache*, [1903] 1 Ch. 457, affirmed, *ibid.*, 955.
(*m*) The effect (*semble*) of *Re Tollemache*, *supra*.
(*n*) Art. 10, *supra*.
(*o*) *Craven* v. *Craddock*, W. N. (1868), p. 229.

ought to be sold, and it is afterwards lost, although without any default on his part, he is liable for the loss, which would not have happened had he not failed in performing the prescribed duty (*p*).

Direction to invest on particular securities.

So, where the settlement orders trust funds to be invested on particular securities, the trustees are bound to invest in such securities *or* in those prescribed by statute (as to which, see *infra*, Article 40). But it would seem that if they are directed to invest in specified securities and *none other*, they may not even now invest in the securities authorised by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, the powers of which are only exercisable *if not forbidden by the settlement* (*q*). The former, repealed, statutory power contained no such restriction (*r*). It has been held by KEKEWICH, J., that where trustees were directed to set apart a sum of money to answer an annuity "in any of the investments in which the proceeds of sale and conversion of my estate is hereby authorised," they were restricted to the securities authorised by the will, and impliedly forbidden to invest in securities authorised by the Act: *sed quære* (*s*).

Must observe conditions imposed on their discretionary powers.

So, where there are any conditions attached to the exercise of any of their functions, they must strictly perform those conditions. For instance, where they are authorised to lend to a husband with the consent of his wife, they cannot make the advance without first getting the required consent, even though they subsequently get it (*t*).

So, again, trustees were impowered to vary investments "with the consent of the tenant for life." They sold consols, and first made an investment with such consent upon a contributory mortgage (which was not an authorised security), and subsequently called the money in,

(*p*) St. § 1269 n.

(*q*) *Orey* v. *Orey*, [1900] 2 Ch. 524.

(*r*) *Re Wedderburn*, 9 Ch. D. 112, decided on s. 11 of Lord St. Leonard's Act, repealed by the Trust Investment Act, 1889 (52 & 53 Vict. c. 32).

(*s*) *Re Owthwaite*, *Owthwaite* v. *Taylor*, [1891] 3 Ch. 494.

(*t*) *Bateman* v. *Davis*, 3 Madd. 98; but see *Stevens* v. *Robertson*, 37 L. J. Ch. 499, where it was held that a consent as to the mode of investing the trust fund might be given, *ex post facto*.

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and *without* such consent reinvested it upon a mortgage which was an authorised one. It was held that, although there was no loss of capital, they were nevertheless bound to *replace the consols* which had since risen in price. For they sold the consols for the purpose of investing in an unauthorised security, which was contrary to the directions of the settlement; and then when they realised that investment, they reinvested the proceeds without the consent of the tenant for life, which was again contrary to the directions of the settlement. In both transactions, therefore, they disobeyed the rule now under consideration, and consequently committed breaches of trust, and were bound to place the beneficiaries in the same position as they would have occupied if no such breach had been committed (*u*).

Cannot accelerate a trust for sale.

On the same principle, where an estate is given in trust for A. for life, and *after his death* upon trust for sale, the trustees cannot sell during the life of A., even with A.'s consent; unless, indeed, all parties beneficially interested in remainder are *sui juris* and consent. For the settlor has prescribed the time at which the sale is to be made, and the trustees must follow out his direction (*x*). Indeed, it has been held, that even the court has no jurisdiction to order an earlier sale (*y*); although, of course, if the trust were being administered by the court, and the court did in point of fact order an earlier sale, the *trustee* would not be liable for obeying the order, and the purchaser would get a good title under s. 70 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). It must also be pointed out that, notwithstanding such a trust, and notwithstanding the consequent inability of the trustees to sell during the life tenancy, it is now competent for the tenant for life

(*u*) *Re Massingberd, Clark* v. *Trelawney*, 63 L. T. 296; and see also *Re Bennison, Cutler* v. *Boyd*, 60 L. T. 859; and *Stokes* v. *Prance*, [1898] 1 Ch. 212.

(*x*) *Leedham* v. *Chawner*, 4 K. & J. 458; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Re Bryant and Barningham*, 44 Ch. D. 218; *Re Head and Macdonald*, 45 Ch. D. 310; 38 W. R. 657. But see also *Soper* v. *Arnold*, 14 App. Cas. 429.

(*y*) *Johnstone* v. *Baber*, 8 Beav. 233; *Blacklow* v. *Laws*, 2 Hare, 40; *Smith* v. *Great Northern Rail. Co.*, 23 W. R. 126; and *Carlyon* v. *Truscott*, 20 Eq. 348.

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himself to sell, under the provisions of the Settled Land Acts, 1882 to 1890, and to cause the purchase-money to be paid to the trustees, they being (by virtue of their future trust for sale) trustees for purposes of those Acts, under s. 16 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69). But a premature sale by *trustees* cannot be forced on an unwilling purchaser simply because all the beneficiaries are subsequently willing to concur (*z*).

PARAGRAPH (2).

Formerly doubtful how far the court could sanction deviation from trust.

Down to the middle of the year 1901 it was very doubtful to what extent the court had jurisdiction to sanction any departure from the terms of a trust, however beneficial it might be for the beneficiaries. *In re Morrison, Morrison* v. *Morrison* (*a*), BUCKLEY, J., held that he had no jurisdiction to sanction an agreement by which trustees concurred in converting into a limited company a business in which the testator was a partner, by the terms of which the testator's share in the business was to be exchanged for shares and debentures in the new company, which were not investments authorised by the will. On the other hand, in *West of England, etc. Bank* v. *March* (*b*), FRY, J., found it possible to sanction such an agreement. In July, 1901, however, the leading case of *Re New* (*c*), came before the Court of Appeal, which, in the exercise of its general jurisdiction, authorised the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a limited company under which shares settled in specie were to be exchanged for shares in the new company which the trustees were not, by their settlements, authorised to hold; the court imposing on them an undertaking to apply for leave to further retain the new shares and debentures if they desired

Decision of the Court of Appeal in *Re New*.

(*z*) *Re Bryant and Barningham, supra*, and *Re Head and Macdonald, supra*.

(*a*) [1901] 1 Ch. 701; and see to same effect, *Re Crawshay, Dennis* v. *Crawshay*, 60 L. T. 357.

(*b*) 23 Ch. D. 138.

(*c*) [1901] 2 Ch. 534.

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Judgment of ROMER, L.J.

to retain them beyond one year. The judgment of the court was delivered by ROMER, L.J,, who said: "As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. . . . But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the *cestuis que trusts*, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, *which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust*, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the court, *and the court in a proper case would have jurisdiction*, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death; and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale. In such a case the court would have jurisdiction to authorise, and would authorise, the trustees to postpone the sale for a reasonable time. It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised

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with great caution, and the court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the court will exercise the jurisdiction; but it need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries *merely because it may appear beneficial to the estate;* and certainly the court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the court must be considered and dealt with according to its special circumstances. As a rule, these circumstances are better investigated and dealt with in chambers. Very often they involve matters of a delicate and private nature, the publication of which is not requisite on any good ground, and might cause great injury to the trust estate."

Common cases in which court sanctions deviations from trust.

The following are the more common instances of the exercise of the inherent power of the court: making advances out of capital for the benefit of an infant (*d*); carrying on a business which is not presently saleable until it can be sold as a going concern (*d*); selling a business to a company in exchange for shares therein, and holding such shares for a limited period (*d*); holding, for a period, land which has been mortgaged to the trustees, and which mortgage they have foreclosed (*d*); approving a compromise or scheme of family arrangement on behalf of infants who are interested under the trust (*e*), and making to an infant a larger allowance for maintenance than the settlor has named where the result would otherwise be to injure the infant's prospects or to cause real property belonging to him to fall into ruin(*f*). In the latter case the court has even gone to the extent of allowing subscriptions to charities on the ground that the testator must have intended that the infant

(*d*) *Per* KEKEWICH, J., in *Re Tollemache*, [1903] 1 Ch. 457; affirmed, *ibid.*, 955.

(*e*) *Re Wells, Boyer* v. *Maclean*, [1903] 1 Ch. 848.

(*f*) *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879; and see also *Griggs* v. *Gibson*, 14 W. R. 538; *Havelock* v. *Havelock*, 17 Ch. D. 807; *Re Collins, Collins* v. *Collins*, 32 Ch. D. 229; *Bennett* v. *Wyndham*, 23 Beav. 521; *Revel* v. *Watkinson*, 1 Ves. sen. 93; *Greenwell* v. *Greenwell*, 5 Ves. 194; and *Barnes* v. *Ross*, [1896] A. C. 625.

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should be brought up and the property maintained in the mode usual amongst gentlemen holding the position to which he was born, so as to keep up the reputation of the family and estate which incidentally involves the payment of subscriptions to local charities (*g*). The question in such cases is whether there is not a paramount intention to be found in the settlement, to which particular directions are to be read as subordinate.

Jurisdiction only exercised in cases of emergency to prevent manifest injury, and not merely for purpose of improving position of beneficiaries.

But the court will not sanction something not authorised by the trust, merely because the course proposed will be beneficial to the beneficiaries, unless there is some real urgency in the case; nor will it sanction something the effect of which is to create a new trust and not to administer the existing one (*h*). Nor does s. 3 of the Judicial Trustees Act, 1896, extend the powers of the court in this matter so as to enable it to excuse a contemplated breach of trust (*h*). For instance, in one case the court refused to sanction the investment of the trust fund in a safe but unauthorised security, although the effect of it would have been primarily to increase the income of the tenant for life, and, secondarily, to enable her to keep up the family home and otherwise to benefit her children the immediate remaindermen (*h*).

Examination of the principle of *Re New*.

The judgment of KEKEWICH, J., in *Re Tollemache* (*i*), throws valuable light on the duty of the court to restrict the application of *Re New* to cases of emergency, and not to extend it to acts which would merely make the estate more profitable to the beneficiaries than it would be by adhering to the settlor's directions. In short, the principle appears to be that the court (and, it is submitted, the trustees without the sanction of the court, as stated in previous editions of this work) (*j*) can depart from the trust in order to prevent grave loss or injury to the property or the beneficiaries; but not for any other reason. The rule is, in

(*g*) See note (*f*), *supra*, p. 173.
(*h*) *Per* KEKEWICH, J., *Re Tollemache*, *supra*.
(*i*) [1903] 1 Ch. 457; and see *per* FARWELL, J., in *Re Walker*, *Walker* v. *Duncombe*, [1901] 1 Ch. 879.
(*j*) See Art. 48, *infra*. But trustees would be very rash to act without the court's protection.

fact, founded on the principle of salvage (as that word is understood in courts of equity), rather than on expediency; and regarded in that light the cases are not so conflicting as they appear at first sight. A judge may in one case well hold that he has jurisdiction to sell trust property to a company for shares, where any other mode of sale is impossible or ruinous; and that he has no jurisdiction to sanction a similar scheme where the only object of it is to get an increased price. It must also be understood that these orders are always made with reluctance, and that in the words of COZENS-HARDY, L.J., "*Re New* constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts" (*k*).

ART. 35.—*Duty of Trustee to act impartially between the Beneficiaries.*

(1) A trustee must be impartial in the execution of his trust, and not exercise his powers so as to confer an advantage on one beneficiary at the expense of another.

(2) Where the capital of the trust property is in any way augmented, the augmentation accrues for the benefit of all the beneficiaries; and is accordingly to be treated as capital, and not as income (*l*).

(3) But a trustee may, unless forbidden by the settlement, pay over a share to a beneficiary to whom it is presently payable, or appropriate a share to a beneficiary to whom it is not presently payable, without liability for any subsequent inequality which may occur by reason of the

(*k*) *Re Tollemache*, [1903] 1 Ch. 955.
(*l*) *Re Barton's Trust*, 5 Eq. 238; *Re Bouch, Sproule* v. *Bouch*, 12 App. Cas. 385.

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PARAGRAPH (1).

Powers of sale and purchase.

Where trustees are empowered to sell real estate and to lay out the proceeds in the purchase of another estate, they would not be justified in selling to promote the exclusive interest of the tenant for life. They must look to the intention of the settlement, and whether another and better purchase is practicable, and not merely probable; or at all events there must be some strong reasons of family prudence (*m*).

Trust to raise debts by sale of land.

Conversely, if lands be devised to trustees upon trust to sell so much as may be required for payment of debts, and subject thereto upon trust for divers persons successively *without impeachment of waste*, the trustees must not raise the money by sale of the timber, for that would be a hardship on the tenant for life (*n*).

Trustees should not purchase woodland estate or mining property or advowson.

Where money is directed to be laid out in the purchase of land to be settled on a person for life, the trustees should not purchase an estate with an overwhelming proportion of trees on it. For if the tenant for life be impeachable for waste, he would lose the fruit of so much as was the value of the timber; and if he be not impeachable, he could, by felling the timber, possess himself of a great part of the corpus of the trust property (*o*). Similar observations apply to the purchase of mining property, or an advowson, both of which might give an undue preference to one beneficiary (*p*).

Choice of investments.

Again, where trustees have a choice of investments, they must not exercise that choice for the *sole* benefit of the tenant for life by investing upon a highly productive but insecure property (*q*). And where any change of investment

(*m*) *Mortlock* v. *Butler*, 10 Ves. 309; *Mahon* v. *Stanhope*, cit. 2 Sug. Pow. 412.
(*n*) *Davies* v. *Westcomb*, 2 Sim. 425.
(*o*) *Burges* v. *Lamb*, 16 Ves. 174. (*p*) Lew. 439.
(*q*) *Raby* v. *Ridehalgh*, 7 D. M. & G. 104; and *Stuart* v. *Stuart*, 3 Beav. 430.

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is to be made with the consent of the tenant for life, and he *improperly* withholds his consent, the court will compel him to give it (*r*).

Trustee must not exert influence against the interest of a beneficiary.

On the principle enunciated in the article now under consideration, trustees must not threaten to exert their influence with third parties to the prejudice of one of their beneficiaries, in order to coerce him into consenting to a disposition of the trust property more favourable to another of the beneficiaries than would be the case if the settlement were strictly performed (*s*).

Paragraph (2).

Augmentation of capital.

Where a company, out of a reserve fund, creates new capital, and allots it gratis among the old shareholders, any shares so allotted to trustees will be held by them as capital, and will not belong to the person entitled to the trust income (*t*).

Bonuses.

So where bonuses are paid as part of capital, they will be retained by the trustee; but where bonuses are mere expressions for extra dividends, this will not be the case. As Fry, L.J., said in *Re Bouch, Sproul* v. *Bouch* (*u*), in a passage quoted with approval by Lord Herschell in giving judgment on the same case in the House of Lords (*x*), "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested in the shares under the testator or settlor; and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern,

(*r*) *Costello* v. *O'Rorke*, 3 Ir. Eq. R. 172.
(*s*) *Ellis* v. *Barker*, 7 Ch. App. 104.
(*t*) *Re Bouch, Sproule* v. *Bouch*, 12 App. Cas. 385; *Re Northage, Ellis* v. *Barfield*, 60 L. J. Ch. 488.
(*u*) 29 Ch. D. 635, at p. 653.
(*x*) 12 App. Cas. 385, at p. 397.

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enures to the benefit of all who are interested in the capital" (*y*). The bonus of a quarter per cent. which was offered to the holders of consols and reduced threes as an inducement to convert their holdings into new $2\frac{3}{4}$ per cents., was by the National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), s. 10, specially declared to be income and not capital.

Profit on realisation of investments.

It need scarcely be pointed out that where, on a change of investment, trust securities realise more than was given for them originally, the profit accrues to capital, and is not considered as income payable to the tenant for life. In the same way, where trustees of a mortgage debt foreclose, and subsequently sell the property for more than the debt and arrears of interest and costs, the balance is to be held by them as an augmentation to the capital of the trust fund. For as any diminution of the trust property would have to be borne by all the beneficiaries, and would not fall on the tenant for life only, so it is only fair that any casual augmentation should belong to all, and not merely to the life tenant.

Profit on reconstruction of company.

A testator gave his estate upon the usual trusts for conversion, with power to postpone, and directed that, pending conversion, the income actually produced should be treated as income. Part of the residue consisted of shares in a company with £8 per share paid up. The company was reconstructed, and the new company paid £9 5*s.* for each of the old shares. The £1 5*s.* was the proceeds partly of the regular reserve fund, and partly of profits which the directors had retained to meet contingencies:—*Held*, that the right of a tenant for life of shares is only to receive dividends and *bonuses in the shape of dividends*, and that,

(*y*) See also *Re Alsbury, Sugden* v. *Alsbury*, 45 Ch. D. 237; and *Re Northage, Ellis* v. *Barfield*, 60 L. J. Ch. 488, in both of which bonuses were treated as income; and *Re Despard, Hancock* v. *Despard*, 17 T. L. R. 478, where a special dividend was held to be income, although the directors proposed to appropriate it to paying up unpaid shares unless shareholders required it in cash; whereas, in *Re Bouch, Sproule* v. *Bouch*, *supra*, they were treated as corpus; and *cf. Re Hopkins's Trusts*, 18 Eq. 696; *Straker* v. *Wilson*, 6 Ch. App. 503; *Hodgson* v. *Elam*, 1 Eq. 188; and *Browne* v. *Collins*, 12 Eq. 586.

although the £1 5*s*. was profits, it was under the circumstances not payable as income (*z*).

Rents directed to be accumulated beyond statutory period, treated as corpus.

On similar principles, where rents were directed to be accumulated beyond the statutory period, it was held that after twenty-one years from testator's death they fell into his residuary estate during the remainder of the period for which they were directed to be accumulated; but that as between tenant for life and remaindermen (of the residue) they must be treated as corpus and not as income (*a*).

PARAGRAPH (3).

Whether trustees can safely pay the share of one beneficiary before paying the others.

The question sometimes arises, whether trustees can safely pay the share of one beneficiary who has attained a vested interest in possession, before paying the other beneficiaries who may not have attained a vested interest, or whose shares (by reason of incapacity or otherwise) are not presently payable. If he does so, it may happen that by reason of subsequent depreciation of securities, the balance retained by the trustee may be insufficient to pay the other beneficiaries in full, in which case the first beneficiary will have got more than the others. It appears, however, to be well settled that if, when the first payment was made, the trustees have, and retain in their hands, assets, which, fairly valued, are sufficient to meet shares which are not presently payable, but have to be held in trust, they are justified in paying other shares payable *pari passu* but payable at once; and are not liable if the assets so retained should, in the event, prove insufficient to pay the unpaid beneficiaries in full (*b*). For the conduct of trustees is regarded with reference to the facts and circumstances existing at the time when they have to act; and therefore, if they make the valuation impartially at the time, they are not liable for an unforeseen loss.

(*z*) *Re Armitage*, *Armitage* v. *Garnett*, [1893] 3 Ch. 337.
(*a*) *Re Pope*, *Sharpe* v. *Marshall*, [1901] 1 Ch. 64.
(*b*) *Per* LINDLEY, L.J., *Re Hurst*, *Addison* v. *Topp*, 67 L. T. p. 99; *Re Winslow*, *Frere* v. *Winslow*, 45 Ch. D. 249; *Fenwick* v. *Clarke*, 4 De G. F. & J. 240; *Re Lepine*, *Dowsett* v. *Culver*, [1892] 1 Ch. 210.

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Whether trustees can appropriate particular securities to answer particular shares payable *in futuro*.

Another question sometimes arises—whether trustees of a will can treat their trust as severable into several trusts, appropriating specific securities to each; or whether they must treat the trust property as one undivided fund, until it becomes necessary, on the death of a life tenant, to pay and distribute his share among his children. For instance, where a testator settles money either in a specific sum or as a share of residue upon each of his daughters for life, with remainder for her children, ought the trustees to treat the daughters' fortunes as one trust, or as several? If a severance and appropriation of securities be lawful, it may sometimes be convenient; but on the other hand, the result may obviously be, that (by reason of the appreciation of one appropriated set of securities, or the depreciation of another, or by both such causes) one family may get less, and the other more than their due proportion of the entire fund. Where the form of the trust is a trust of specific sums (*e.g.*, £1,000 to be held upon trust for a testator's daughter A. for life, with remainder for her children equally, and £1,000 to be held upon a similar trust for his daughter B. and her children), such appropriation is not only undoubtedly legitimate, but ought to be made (*c*). So where the form of the trust is to divide a testator's residuary estate between his children equally, the daughters' shares to be retained, and invested upon trust for them respectively for life, with remainder to their respective children; if, when the appropriation is made, the securities are fairly valued and fairly appropriated, there can be no objection; and when once the appropriation is made, the subsequent depreciation of one appropriated fund cannot be made good out of the appreciation of another (*d*). Moreover, it has recently been held by STIRLING, J., that even where the form of the trust

(*c*) *Fraser* v. *Murdoch*, 6 App. Cas. 855; *Re Walker*, *Walker* v. *Walker*, 62 L. T. 449; and see also *Re Lepine*, *Dowsett* v. *Culver*, *supra*, and *Barclay* v. *Owen*, 60 L. T. 220. But an appropriation of securities is only valid if the appropriated securities were both authorised and sufficient at the date of the appropriation; see *Re Waters*, *Preston* v. *Waters*, W. N. (1889) 39. It is not, however, necessary that where a trustee appropriates securities to one beneficiary he should contemporaneously appropriate to all (*Re Richardson*, *Morgan* v. *Richardson*, [1896] 1 Ch. 512; *Re Nickels*, *Nickels* v. *Nickels*, [1898] 1 Ch. 630).

(*d*) *Re Nickels*, *supra*; *Re Brooks*, *Coles* v. *Davis*, 76 L. T. 771.

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is such, that no immediate severance into shares is directed until a share of corpus becomes distributable, an appropriation may be lawfully made; although the usual practice, both of trustees and of the court itself (in the administration of estates and trusts), has been to make no appropriation in such cases (*e*).

Appropriation of land or chattels to answer a particular share.

The question is somewhat different where the estate is not wholly converted into money or securities for money. In that case, it is scarcely possible to value the estate with certainty. Nevertheless, executors and also trustees with power of sale can appropriate a specific part of the estate (*e.g.*, leaseholds or freeholds) as part of the share of one beneficiary, *with his consent*, on the ground that they can sell it to him and set off the purchase-money against his share (*f*).

No appropriation can be made to answer a contingent legacy of a fixed sum.

There can be no appropriation, however, to answer a contingent pecuniary legacy; for the legatee is entitled, if and when the contingency happens, to the exact sum, neither more nor less. In such cases, therefore, executors must take care to set aside funds with an ample margin for depreciation; otherwise, they may find themselves personally responsible (*g*).

ART. 36.—*Duty of Trustee to sell Wasting and Reversionary Property.*

Where residuary personal estate is settled by will for the benefit of persons in succession, all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorised securities, must be converted into property of a permanent and immediately income-bearing character, unless:

(a) the will contains a direction or implication to the contrary; or

(*e*) *Re Nickels*, *supra*; and see *Re Brooks*, *Coles* v. *Davis*, *supra*.
(*f*) *Re Beverley*, *Watson* v. *Watson*, [1901] 1 Ch. 681.
(*g*) *Re Hall*, *Foster* v. *Metcalfe*, [1903] 2 Ch. 226.

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(b) the will confers on the trustee a discretion to postpone such conversion, which he *bonâ fide* and impartially exercises.

Rule in *Howe* v. *Lord Dartmouth*.

The above rule, known as the rule in *Howe* v. *Lord Dartmouth* (*h*), is really a corollary of the principle stated in Art. 35, viz., that the trustee must act impartially between the beneficiaries. For if wasting property (such as leaseholds, terminable annuities, and the like) were to be retained, the tenant for life would profit at the expense of the remaindermen; and if reversionary property were not converted, the remaindermen would profit at the expense of the tenant for life. It must, however, be borne in mind that the rule is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him. Courts of equity have consequently always declined to apply the rule in cases where the settlor has indicated an intention that the property should be enjoyed in specie, though he may not, in a technical sense, have specifically said so. The real question, therefore, in all such cases, is whether the settlor has, with sufficient distinctness, indicated his intention that the property should be enjoyed in specie (*i*); for the burden of showing this lies upon the party who desires that the rule in *Howe* v. *Lord Dartmouth* should not be applied (*j*).

Not applicable to settlements *inter vivos*.

The rule is confined to residuary personal estate settled by will (*k*), with regard to which a testator cannot be presumed to foresee its nature. Settlements of existing property by deed are necessarily specific, and therefore excluded from the rule. It has, however, been suggested that the rule may apply to covenants to settle after-acquired property (*l*), but this was negatived by COZENS-HARDY, J., in a recent case (*m*), on the ground that such

(*h*) 1 Wh. & Tu. 68; and see also *Hinves* v. *Hinves*, 3 Hare, 609; and *Pickering* v. *Pickering*, 4 My. & Cr. 289.
(*i*) *Per* BAGGALLAY, L.J., *Macdonald* v. *Irvine*, 8 Ch. D. p. 112.
(*j*) *Per* JAMES, L.J., same case.
(*k*) *Re Van Straubenzee*, *Boustead* v. *Cooper*, [1901] 2 Ch. 779.
(*l*) Vaizey on Settlements, p. 421.
(*m*) *Re Van Straubenzee*, *Boustead* v. *Cooper*, *supra*. See also *Milford* v. *Peile*, 2 W. R. 181; *Hope* v. *Hope*, 1 Jur. (N.S.) 770.

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covenants are contracts between the parties, and not wills, and must be performed in strict accordance with their terms; so that, unless the covenant contains a direction to convert such after-acquired property and invest the proceeds, the inference is that the parties meant it to be enjoyed in specie (*m*).

Not applicable to property given specifically.

Although the mere absence of a direction to convert wasting property has never been construed to mean that it should be enjoyed in specie, yet, where such property is given *specifically* in the strict sense of the term, *i.e.*, where it is expressly referred to, the rule has no application. For in such cases, in the absence of express direction, the presumption is, that the testator, by naming the specific property, intended that it should be enjoyed in the shape in which he left it. If, therefore, a testator bequeaths specific leaseholds in trust for persons successively, it will not be the duty of the trustees to sell them and invest the proceeds on permanent investments; but they must pay the entire rents to the first taker, notwithstanding that, by reason of the terminable nature of the property, the ultimate remainderman may be disappointed (*n*). This distinction between specific trust bequests and residuary trust bequests is observed even where the specific bequest and the residuary bequest were given to the same person for life (*o*).

Illustrations of the general rule.

Where a testator's residuary estate was settled upon one for life, with remainders over, it was held that long, but terminable, annuities, which formed part of it, ought to be sold, and the proceeds invested on permanent trust securities (*p*).

Intermediate income of sum set aside.

On similar grounds, where part of the estate consists of the intermediate income of a fund set apart to answer a future liability, the intermediate income must be treated as capital (*q*).

(*n*) *Re Beaufoy*, 1 Sm. & Giff. 20.

(*o*) *Macdonald* v. *Irvine*, 8 Ch. D. 101 (BAGGALLAY, L.J., diss.).

(*p*) *Tickner* v. *Old*, 18 Eq. 422; *Porter* v. *Baddeley*, 5 Ch. D. 542; but see *contra*, *Wilday* v. *Sandys*, 7 Eq. 455, where, on the construction of the will, it was held that the trustees were authorised to hold long annuities.

(*q*) *Re Whitehead*, *Peacock* v. *Lucas*, [1894] 1 Ch. 678.

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Leaseholds.

A testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, with remainders over. He died possessed of leaseholds, among other property. It was held that the widow was not entitled to retain the leaseholds, but that they must be sold and the proceeds invested in stock (*r*).

Rule applies to all unauthorised securities.

The rule is equally applicable to a testator's investments which are not authorised to be retained either by the will or by statute. Such investments being regarded as speculative, and therefore possibly wasting, ought to be converted as soon as possible.

Foreclosed mortgages.

So where trustees are obliged to foreclose a mortgage, they must promptly sell the property if they can get a fair price for it; unless, of course, they are authorised to invest in the purchase of land. Where, however, a serious loss would result from an immediate sale, the court will authorise the retention of the land for a limited period (*s*).

SUB-PARAGRAPHS (a), (b).

Rule not applicable where contrary intention expressed.

As already stated, the rule in *Howe* v. *Lord Dartmouth* is subject to any contrary intention which may be expressed or implied in the settlement. Moreover, it is immaterial whether the contrary intention is imperatively expressed, or whether a discretion to convert or not is expressly given to the trustees; for the court will not interfere with a discretion so long as trustees exercise it in good faith (*t*). Thus, in one case a testator gave his residuary estate, which included several leasehold houses (held upon short terms), to trustees, upon trust to pay the income to his wife for life, with remainder to his grandchildren, and gave his trustees *power to retain any portion of his property in the same state in which it should be at his decease*, or to sell and convert the same as they should think fit. It was held that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property,

(*r*) *Benn* v. *Dixon*, 10 Sim. 636.
(*s*) *Per* KEKEWICH, J., *Re Tollemache*, [1903] 1 Ch. 457, 461.
(*t*) *Gisborne* v. *Gisborne*, 2 App. Cas. 300; *Tabor* v. *Brooks*, 10 Ch. D. 273.

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and that the trustees were at liberty to retain the short leaseholds, and any other investments held by the testator, for such period as they should think fit (*u*). A similar decision was arrived at where a testator authorised his trustees to postpone the sale of his business (*v*).

Discretion given to trustees as to time of sale.

So, again, where the testator devised wasting property to trustees, upon trust to sell "when in their discretion they should deem it advisable," it was held that the trustees were not bound to sell until they deemed meet (*w*).

Rule not applicable where impliedly negatived.

The above cases are instances of an express intention that the trustees should have a discretion; but the same result will follow where that intention can be implied. Thus, a testator, after a specific bequest, gave all his residuary estate, both real and personal, to trustees, upon trust, to *sell so much and such part thereof as they might think necessary for paying all his mortgage and other debts and funeral and testamentary expenses*, and to invest the balance of the proceeds, and to stand possessed of such investments, *and all other his residuary estate*, upon trust for several persons successively for their respective lives, with remainders over. Part of the testator's estate consisted of leaseholds, which were retained unsold. On this state of facts it was held that, on the construction of the will, the trustees had a discretion as to what part of the testator's estate should be converted, and that the court could not interfere with such discretion (*x*).

So it has been held that an express direction for sale at a particular period, indicates an intention that there should be no previous sale (*y*); and even a *power* to sell all or any part of the estate in the absolute discretion of the trustees has been held to negative the *primâ facie* duty of selling

(*u*) *Gray* v. *Siggers*, 15 Ch. D. 74.

(*v*) *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56; but see *Re Smith, Arnold* v. *Smith*, [1896] 1 Ch. 171.

(*w*) *Miller* v. *Miller*, 13 Eq. 263; *Thursby* v. *Thursby*, 19 Eq. 395; and see also *Re Chancellor, Chancellor* v. *Brown*, 26 Ch. D. 42; and *Re Crowther, Midgley* v. *Crowther*, *supra*, in both of which cases the property consisted of a business.

(*x*) *Re Sewell's Estate*, 11 Eq. 80.

(*y*) *Alcock* v. *Sloper*, 2 M. & K. 697; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290.

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wasting or reversionary property forthwith (*z*). A similar view has been taken of a direction to *divide* property after the death of the late tenant (*a*). So, in some cases, it has been decided that a trust to pay *rents* to the tenant for life, *where the testator has only leaseholds* (*b*); or a direction that the trustees should give a power of attorney to the life tenant to receive the income (*c*), is a sufficient indication of a contrary intention to take the case out of the general rule.

A testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not consist of money, *or be invested in any of the public funds or government securities*, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths upon other trusts. On the construction of these words it was held, that long annuities, of which the testator died possessed, fell within the exception of "public funds or government securities," and ought not to be converted (*d*). On the other hand, in *Tickner* v. *Old* (*e*), where the direction was to convert the residue and invest in *government* or real securities, with power to continue invested any *government stocks* or real securities of which the testator might die possessed, it was held that government securities meant only such as were of a permanent character, and that long annuities ought to be converted. It will be perceived that it is not easy to distinguish these two cases, which convey a warning to the practitioner how extremely dangerous it is to advise trustees to act upon implied intentions, either one way or the other, without taking the opinion of the court on originating summons.

(*z*) *Re Pitcairn, Brandreth* v. *Colvin*, [1896] 2 Ch. 199.
(*a*) *Collins* v. *Collins*, 2 M. & K. 703.
(*b*) *Goodenough* v. *Tremamondo*, 2 Beav. 512; *Cafe* v. *Bent*, 5 Hare, 24; *Vachell* v. *Roberts*, 32 Beav. 140.
(*c*) *Neville* v. *Fortescue*, 16 Sim. 333.
(*d*) *Wilday* v. *Sandys*, 7 Eq. 455.
(*e*) 18 Eq. 422; and see also *Porter* v. *Baddeley*, 5 Ch. D. 542.

Art. 37.—*Duty of Trustee as between Tenant for Life and Remainderman in Relation to Property pending conversion.*

(1) Where property ought to be converted, and the proceeds invested, the tenant for life is entitled, pending conversion, to receive or to be credited with income in accordance with the following rules, viz. :

(a) He is entitled to the whole income of income-bearing property if the settlement so directs or implies (*f*) ; and (*semble*) to the whole of the net rents of real estate (*g*).

(b) Where the property is of a wasting nature (and, *semble*, even where, being personal estate, it is not), and even if there is an express power to postpone conversion *until a suitable opportunity occurs*, he is only entitled to interest at the rate of 3 per cent. per annum on the amount ultimately realised (*h*).

(c) Where the property is of a reversionary nature, he is entitled, when it falls in, to a proportionate part of the capital, representing 3 (*i*) per cent. compound interest (with yearly rests) on the true

(*f*) See *Re Sheldon, Nixon* v. *Sheldon*, 39 Ch. D. 50 ; *Re Thomas, Wood* v. *Thomas*, [1891] 3 Ch. 482. Where the property is of a non-wasting nature, the court will accept very slight evidence of implied intention.

(*g*) *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361 ; *Re Searle, Searle* v. *Baker*, [1900] 2 Ch. 829.

(*h*) *Brown* v. *Gellatly*, 2 Ch. App. 751.

(*i*) See *Re Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537 ; *Re Morley, Morley* v. *Haig*, *ibid.* 738 ; *Re Hobson, Walker* v. *Appach*, 53 L. T. 627 ; and *Re Duke of Cleveland, Hay* v. *Wolmer*, [1895] 2 Ch. 542 ; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

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actuarial value of the property at the testator's death; calculated on the assumption that the actual date when the property fell into possession could have been then predicted with certainty (*k*).

(d) Upon complete realisation of an insufficient security, the money realised must be divided between tenant for life and remainderman in proportion to the amount due for arrears of interest and the amount of capital remaining due (*l*).

(2) This article has no application to investments made by trustees in breach of trust where no loss results; but is confined to cases where unavoidable delay takes place in converting property in due course of administration (*m*), and to cases where a security (whether authorised or not) has become depreciated.

This article is a further corollary of Art. 35, and its main principle forms the second part of the rule in *Howe* v. *Lord Dartmouth*, viz., that, pending a conversion which ought to be made, the tenant for life is, *primâ facie*, entitled to the income which would be produced by the proceeds of the conversion, if it were made; and nothing more. The rule, like so many equitable rules, is founded on the maxim

(*k*) *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; followed, with variations as to rate of interest, in *Re Goodenough*, *Marland* v. *Williams*, *supra*: *Re Morley*, *Morley* v. *Haig*, *supra*: *Re Hobson*, *Walker* v. *Appach*, *supra*: and *Re Duke of Cleveland*, *Hay* v. *Wolmer*, *supra*.

(*l*) *Re Atkinson*, *Barbers' Co.* v. *Grose-Smith*, [1904] W. N. 120 (only just decided by the Court of Appeal, which will doubtless be fully reported in [1904] 2 Ch.), overruling *Re Foster*, *Lloyd* v. *Carr*, 45 Ch. D. 629, and *Re Phillimore*, *Phillimore* v. *Herbert*, [1903] 1 Ch. 942.

(*m*) See *per* BYRNE, J., *Re Appleby*, *Walker* v. *Lever*, [1903] 1 Ch. 565, at p. 566; and *Stroud* v. *Gwyer*, 28 Beav. 130; but *cf* *Re Hill*, *Hill* v. *Hill*, 50 L. J. Ch. 551.

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that Equity regards that as done which ought to be done. Consequently it has no application where, on the true construction of the settlement, the wasting or reversionary property is not to be converted. Nor does it apply where the trustees have a discretion in the matter, and it appears to have been intended that, until conversion, the income should be enjoyed in specie. Where, on the other hand, there is merely a power to postpone conversion *for the purpose of selling the property to the best advantage*, and there is no indication that the power is inserted for the benefit of the tenant for life as against the remainderman, the rule applies. However, unless the settlement is very explicit, trustees should always be advised to take the opinion of the court before paying the actual income to a tenant for life.

Paragraph (1) (a).

Settlement directing that income is to be enjoyed in specie.

Where a testator devised his brickfield (which was, of course, property of a wasting nature) to trustees upon trust to sell when, in their discretion, it might seem advisable; and directed that the rents and profits should, until sale, be considered as part of his personal estate, and be applicable and applied *in the same manner as the dividends or interest to arise from the investments of the sale moneys;* it was held that the tenant for life was entitled to the whole of the royalties paid by tenants of the brickfield, although the trustees did not sell the property for ten years (*n*). If, however, the italicised words had not been inserted in the will, it seems plain that the power to postpone conversion would not of itself have authorised the payment of the whole of the royalties to the tenant for life. For, in that case, the inference would have been, that the power to postpone conversion was for the purpose of efficiently selling the estate, and not for the benefit of the tenant for

(*n*) *Miller* v. *Miller*, 13 Eq. 263; and see also *Thursby* v. *Thursby*, 19 Eq. 395, where the whole of colliery royalties were held to be payable to the tenant for life, and *Re Crowther*, *Midgley* v. *Crowther*, [1895] 2 Ch. 56.

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life (*o*). The question is really one of construction, viz., whether the testator intended that the power to postpone should be exercised for the benefit of the tenant for life, or merely for the more convenient realisation of the estate.

Settlement implying that income is to be enjoyed in specie.

A testator empowered his trustees, at their discretion, *to continue* all or any part of his personal estate in the state of investment in or upon which the same should be at his death; or to convert it, and invest the proceeds in the names of the trustees in certain specified securities. Part of the personal estate consisted of securities not specifically authorised, which were retained:—*Held*, that the tenants for life were entitled to receive the actual income of those securities which were retained (*p*). It will be perceived that the testator authorised the *continuance* of securities, and not merely the postponement of their conversion; otherwise, it is conceived that the decision might have been different.

Another example of an implied intention that income should, pending conversion, be enjoyed in specie, is afforded by the case of *Re Thomas*, *Wood* v. *Thomas* (*q*). There a testator gave his residuary estate to trustees upon trust for conversion and investment of the proceeds in specified securities; with power to the trustees in their absolute discretion to retain any securities or property belonging to him at his death unconverted, for such period as they should think fit. He then declared that they should stand possessed of "the stocks, funds, shares, and securities for the time being *constituting* or representing the residuary personal estate and effects thereinbefore bequeathed *and of the income thereof*," upon trust to pay the income to certain persons for life with remainders over. The estate comprised certain American bonds, which were not included among the securities authorised by the will as investments, but were retained by the trustees in exercise of the

(*o*) *Re Carter*, 41 W. R. 140; *Brown* v. *Gellatly*, 2 Ch. App. 751.
(*p*) *Re Sheldon*, *Nixon* v. *Sheldon*, 39 Ch. D. 50; and see also as to rents of leaseholds, *Gray* v. *Siggers*, 15 Ch. D. 74.
(*q*) [1891] 3 Ch. 482.

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discretion given to them :—*Held*, that, on the true construction of the will, the tenants for life were entitled to the whole income of the bonds in specie. In giving judgment, KEKEWICH, J., said : "I am not prepared to hold, that, where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention *necessarily* gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion. But I have no doubt that one looks out with an expectant eye for a direction that the tenant for life shall receive the income when there is an express direction to the trustees to retain securities, or any indication of the testator's intention that they shall retain them indefinitely for so long as they may think fit."

Rents of real estate pending conversion.

Realty was settled upon trust to sell and invest the proceeds, and to pay the dividends to B. for life, with certain limitations over after his death. There was no direction as to payment of the intermediate rents pending sale. The land was sold *without undue delay;* but, pending the sale, the rents produced more than four per cent. per annum on the amount realised by the sale. On these facts it was held by KEKEWICH, J., that, notwithstanding the absence of any power to postpone the sale, or any direction as to the interim rents, the whole rents belonged to B., the tenant for life (*r*). His lordship carefully rested his judgment upon implied intention, and not upon any rule of law differentiating real estate which ought to be converted, from personal estate subject to a like trust. It is, however, difficult to understand how any such implied intention was found in this case, apart from the obvious convenience of the decision ; and if convenience is to be the test of intention, it would seem to follow that such intention should be implied in every case where land is directed to be sold, unless the contrary is

(*r*) *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361.

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expressed. Indeed, the learned judge seems to have come to this conclusion in the subsequent case of *Re Searle*, *Searle* v. *Baker* (*s*), where he laid the rule down broadly that the tenant for life of real estate is always entitled to the intermediate rents where the sale is postponed (either under a power, or otherwise), without impropriety.

PARAGRAPH (1) (b).

Tenant for life not entitled to whole income of destructible property or unauthorised investments if settlement silent.

In the leading case of *Brown* v. *Gellatly* (*t*), the testator, who was a shipowner, directed his trustees to convert his personal estate into money, when and in such manner as they should see fit, and gave them power to sail his ships until they could be disposed of satisfactorily. The proceeds of his personal estate were then settled upon tenants for life, with remainders over. The will contained a wide power of investment in specified securities. On his death, the testator possessed (1) numerous ships; (2) securities falling within those authorised by the will; and (3) shares and investments not so authorised. The ships could not be immediately sold, nor could the unauthorised securities. Both, pending sale, produced a high rate of income; and the question arose, whether the tenants for life were entitled to the whole of that income, or only to some, and, if so, what, proportion thereof? In giving judgment, Lord CAIRNS said: "We find no indication whatever of an intention that the ships were to remain unconverted for any specific time. The testator, who had been engaged in the shipping business, knew perfectly well, and shows that he knew, that some time would necessarily be taken in converting the ships; and therefore he very wisely provided that, until they were sold, the executors should have a power (which otherwise they would not have possessed), viz., the power to sail the ships for the purpose of making profit. But, in giving that power, he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit of the parties in remainder as against the interest

(*s*) [1900] 2 Ch. 829.

(*t*) 2 Ch. App. 751; and see also *Hume* v. *Richardson*, 4 De G. F. & J. 29, and *Re Lynch Blosse*, *Rickards* v. *Lynch Blosse*, W. N. (1899) 27.

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of the tenant for life, but says that it is to be exercised or the benefit of the estate, meaning, as I apprehend, for the benefit of the estate generally, without disarranging the equities between the successive takers. In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir JAMES PARKER, in the case of *Meyer* v. *Simonsen* (*u*); and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have four per cent. on such value; and the residue of the profits must of course be invested and become part of the estate. Then, secondly, as to the authorised securities; the tenant for life is, in my opinion, entitled to the specific income of the securities, just as if they had been three per cent. consols. I understand the words of the will as amounting to the constitution by the testator of a larger class of authorised securities than this court itself would have approved of; and the court has merely to follow his directions, and treat the income accordingly, as being the income of authorised securities. Then comes the third question in the case; the securities not ranging themselves under any of those mentioned in the last clause of the will. As they do not come within the class of authorised securities, it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted. I do not mean to say that the trustees were by any means open to censure for not having converted them within the year after testator's death, but I think that the rights of the parties must be regulated as if they had been so converted. I think the proper order to make is that which was made in *Dimes* v. *Scott* (*v*), followed by WIGRAM, V.-C., in the case of *Taylor* v. *Clark* (*x*), namely, to treat the tenant for life as entitled, during the year after the testator's death, to the dividends upon so much three per cent. stock as would have been produced by the conversion and investment of the property at the end of the year."

Income derived from property

On the same principle, where part of a testator's residuary estate consisted of a colliery of which he was mortgagee in

(*u*) 5 De G. & Sm. 723.
(*v*) 4 Russ. 195.
(*x*) 1 Hare, 161.

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of which testator was mortgagee in possession.

possession, the question arose as to how accumulations of the income, derived from working the colliery since the testator's death, were to be apportioned between tenant for life and remaindermen. It was held that the proper principle was, that so much as would, if invested at the testator's death at four per cent. with yearly rests, have amounted to the sum in the hands of the trustees, should be treated as capital, and the rest as income (*y*). In other words, the income received from the colliery, less four per cent., was considered as received on capital account, the four per cent. being paid to the tenant for life without prejudice to his rights to further allowances on account of interest in the event of the colliery being realised. Nowadays three per cent. would be substituted for four.

PARAGRAPH (1) (c).

Tenant for life entitled to part of *corpus* of non-income-bearing property when realised.

In the above cases, the income actually received by the trustees exceeded that which they were authorised to pay to the tenant for life; but the same principle applies in favour of the tenant for life, where the property is not presently saleable or realisable except at an unreasonable loss, and, pending realisation, produces no income. For instance, where part of the estate consists of a policy of assurance on another's life which does not fall in for some years after the testator's death, or a reversion (*z*), then unless the settlor contemplated that it should not be sold (*a*), it would be unfair to the tenant for life that he should lose intervening income. In such cases, when it does fall in, the money must be apportioned, as between capital and income, by ascertaining the sum which, put out at three per cent. (*b*) per annum on the day of the testator's death, and accumulated at compound interest with yearly rests, and deducting income tax, would, with the accumulations, have produced the amount actually received. The sum so ascertained must be treated as

(*y*) *Re Godden, Teague* v. *Fox*, [1893] 1 Ch. 292.
(*z*) *Re Hobson, Walker* v. *Appach*, 53 L. T. 627; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.
(*a*) *Re Pilcairn, Braudreth* v. *Colvin*, [1896] 2 Ch. 199; but *cf. Re Hubbuck, Hart* v. *Stone*, [1896] 1 Ch. 754.
(*b*) *Re Goodenough, Morland* v. *Williams*, [1895] 2 Ch. 537; and *Re Duke of Cleveland, Hay* v. *Wolmer*, *ib.* 542. It was formerly 4 per cent.

capital, and retained by the trustees. The residue is income, and must be paid to the tenant for life (*c*). The same principle applies where a debt due to the estate is recovered by the trustees without interest (*d*).

Paragraph (1) (d).

Corpus realised by insufficient security is divided between capital and income if latter in arrear.

Where a trust security turns out to be insufficient, and interest is in arrear, the sum ultimately realised by the depreciated security is divisible between capital and overdue income—even where the settlor has directed that the actual income of his estate pending conversion shall be treated as income, but that no property not actually producing income shall be treated as producing any (*e*). But the principles on which such division ought to be made have only just been firmly settled by the Court of Appeal.

In *Re Foster, Lloyd* v. *Carr* (*f*), Kay, J., held that the security is to be regarded as a security for the amount actually realised plus the interest actually received by the tenant for life (apparently from the beginning); and that the sum so ascertained should be divided between tenant for life and remainderman in the proportion which the interest which the tenant for life ought to have received, bears to the capital sum which was secured by the security; the tenant for life giving credit for all income actually received by him.

This principle was, however, dissented from by North, J., in *Lyon* v. *Mitchell* (*g*), and more recently was not followed by Kekewich, J., in *Re Alston, Alston* v. *Houston* (*h*), where his lordship divided the sum realised between tenant for life and remainderman in proportion to the amounts due to each at the date of realisation, without regarding on either side of the account the interest actually received in the past

(*c*) *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; and see also *Massy* v. *Gahan*, 23 L. R. Ir. 518; *Re Morley, Morley* v. *Haig*, [1895] 2 Ch. 738.
(*d*) *Re Duke of Cleveland's Estate, Hay* v. *Wolmer*, [1895] 2 Ch. 542.
(*e*) *Re Hubbuck, Hart* v. *Stone*, [1896] 1 Ch. 754.
(*f*) 45 Ch. D. 629; and see *Re Ancketill*, 27 L. R. Ir. 331; *Delves* v. *Newington*, 52 L. T. 512, and *Re Godden, Teague* v. *Fox*, [1893] 1 Ch. 292
(*g*) W. N. (1899) 27. (*h*) [1901] 2 Ch. 584.

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by the tenant for life, except so far as it reduced the arrears. The same principle had been previously followed in *Re Moore* (*i*) by PEARSON, J.

In the more recent case of *Re Phillimore, Phillimore* v. *Herbert* (*j*), however, SWINFEN EADY, J., adopted a third course, and divided the amount realised between tenant for life and remainderman, making the tenant for life bring into hotchpot all that he had received by way of income *since the date when the security first became insufficient.*

The defect of the rule, as stated by his lordship, and still more as stated by KAY, J., is that if the principle were carried out logically a tenant for life who had rightfully received income might be called upon to refund it—a thing unheard of. However the point was fully threshed out before the Court of Appeal in the case of *Re Atkinson, Barbers' Co.* v. *Grose-Smith* (*k*), in which *Re Alston, Alston* v. *Houston* and *Re Moore* were followed, and *Re Foster, Lloyd* v. *Carr* and *Re Phillimore, Phillimore* v. *Herbert* overruled.

PARAGRAPH (2).

How far rule applies to unauthorised investments made by trustee.

The rule as to the tenant for life being only entitled to three per cent. on investments made by the settlor which ought to be converted, does not apply to investments made by the trustee in breach of trust. In such cases, if no loss of capital is sustained, the remainderman is not entitled to call on the trustee to increase the capital by adding to it the difference between the income actually paid to the tenant for life and three per cent. (*l*). For in such cases (herein differing from speculative or wasting property settled by the settlement) the amount of the trust fund is definitely ascertained; and if it has not in fact been depreciated by the

(*i*) 54 L. J. Ch. 432; and see *Re Barker, Barker* v. *Barker*, W. N. (1897) 154; and *Stewart* v. *Kingsale*, [1902] 1 I. R. 496.

(*j*) [1903] 1 Ch. 942; and see also *Cox* v. *Cox*, 8 Eq. 343; and *Turner* v. *Newport*, 2 Ph. 14.

(*k*) [1904] W. N. 120. Will doubtless be reported fully in [1904] 2 Ch.

(*l*) *Per* BYRNE, J., *Re Appleby, Walker* v. *Lever*, [1903] 1 Ch. 565, at p. 566; *Stroud* v. *Gwyer*, 28 Beav. 130; but *cf. Re Hill, Hill* v. *Hill*, 50 L. J. Ch. 551.

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breach of trust, the remainderman has no equity to have it appreciated at the expense of the life tenant.

But where by reason of a breach of trust the capital has become depreciated ; then when it is realised, although the tenant for life, who was no party to the breach, cannot be ordered to refund income, yet he will not get any part of the amount realised to make up arrears (if any), without bringing into hotchpot all the income he has received from the security *during its entire continuance*, as that is the only way of approximately placing the beneficiaries in the positions in which they would have been if no breach had been committed (*m*).

ART. 38.—*Duty of Trustee in relation to the payment of outgoings out of Corpus and Income respectively.*

Subject to the directions of the settlement, and of particular statutes, the following rules govern the incidence of outgoings—

(a) The corpus bears capital charges, and the income bears the interest on them (*n*). If the current income is insufficient arrears must be paid out of subsequent income (*o*).

(b) The income usually bears current expenses (*p*), including the entire cost of keeping leaseholds in repair (*q*).

(*m*) *Re Bird, Dodd* v. *Evans*, [1901] 1 Ch. 916 ; and comments thereon of Warrington, K.C., *arguendo* in *Re Alston, Alston* v. *Houston*, [1901] 2 Ch., at p. 587.

(*n*) *Marshall* v. *Crowther*, 2 Ch. D. 199 ; *Whitbread* v. *Smith*, 3 D. M. & G. 727 ; and see and consider *Norton* v. *Johnstone*, 30 Ch. D. 649.

(*o*) *Honywood* v. *Honywood*, [1902] 1 Ch. 347 ; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511.

(*p*) *Fountaine* v. *Pellet*, 1 Ves. jun. 337, 342, rates and taxes ; *Shore* v. *Shore*, 4 Drew. 501, receiver's commission and expenses of passing accounts.

(*q*) See *Re Gjers, Cooper* v. *Gjers*, [1899] 2 Ch. 54 ; and *Re Betty, Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821.

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(c) Where repairs to trust freeholds or copyholds are necessary to save them from destruction (*r*), or fines become payable for the renewal of leases (*s*), or for putting in repair leasehold property which was out of repair at the date of the creation of the trust (*t*), the court may empower the trustees to raise the necessary amount in such a way as will be equitable between income and corpus.

(d) All costs incident to the administration and protection of the trust property, including legal proceedings, are borne by corpus (*u*), unless they relate exclusively to the tenant for life (*x*).

SUB-PARAGRAPH (a).

Charges and incumbrances.

Where a capital sum is secured on property, it is payable out of corpus; but the interest on it is payable out of income (*y*) arising not only from the incumbered property, but from all other property comprised in the same trust (*z*). If the current income is insufficient to keep down the interest, the arrears are payable out of subsequent income (*z*); and this is so, even where the charge in respect of which

(*r*) *Re Courtier, Coles* v. *Courtier*, 34 Ch. D. 136; *per* COTTON and LINDLEY, L.JJ., *Re Hotchkys, Freke* v. *Calmady*, 32 Ch. D. 408.

(*s*) Seton on Decrees, 4th ed., 1270; *White* v. *White*, 9 Ves. 554; *Nightingale* v. *Lawson*, 1 B. C. C. 440. The law as between tenant for life and remaindermen in respect to renewal of leases is not altered by s. 19 of the Trustee Act, 1893 (*Re Baring, Jeune* v. *Baring*, [1893] 1 Ch. 61).

(*t*) *Re Copland's Settlement, Johns* v. *Carden*, [1900] 1 Ch. 326.

(*u*) *Lord Brougham* v. *Poulett*, 19 Beav. 135; *Sanders* v. *Miller*, 25 Beav. 154; *Re Earl De la Warr's Estates*, 16 Ch. D 587; *Stott* v. *Milne*, 25 Ch. D. 710; explained by *Re Weall, Andrews* v. *Weall*, 42 Ch. D. 674.

(*x*) See *Re Marner's Trusts*, 3 Eq. 432; *Re Evans*, 7 Ch. App. 609; *Re Smith's Trusts*, 9 Eq. 374.

(*y*) *Marshall* v. *Crowther*, 2 Ch. D. 199; *Whitbread* v. *Smith*, 3 D. M. & G. 727; and see *Allhusen* v. *Whittell*, 4 Eq. 295.

(*z*) *Honywood* v. *Honywood*, [1902] 1 Ch. 347; *Freeven* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Re Hotchkys, Freke* v. *Calmady*, 32 Ch. D. 408.

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the arrears have arisen has been paid off by means of a sale of part of the property (*z*).

The rule as to capital charges being borne by corpus prevails even where a debt is secured by, or is payable as, an *annuity* or by instalments. In such a case the annuity must be valued, and the tenant for life will then contribute an amount equal to interest on the valuation at four per cent. (*a*). Thus, expenses incurred by a local authority in sewering, paving, and flagging a new street, and charged by statute on the adjacent land, are a charge on corpus and not income, even although they, with interest, are repayable to the local authority by instalments (*b*). Arrears of interest on incumbrances accrued in the lifetime of the settlor, are a charge on corpus, the tenant for life merely paying interest on them (*c*).

The strong inclination of the court to saddle capital charges on corpus, is well exemplified by *Norton* v. *Johnstone* (*d*). There, a testator had directed that the income of certain estates should be accumulated until the amount of the accumulations should be sufficient to pay off existing mortgages; and that, subject thereto, the property should be held to the use of the plaintiff for life, with remainders over. Before the accumulations were sufficient to discharge the mortgages, the mortgagees sold a part of the property; and with the moneys so produced, and part of the moneys already accumulated, the mortgages were paid off. The tenant for life then claimed to be let into possession, and also to have the balance of the accumulations paid to him. On the other hand, the remainderman urged that inasmuch as the mortgage debt had been paid off by means of a sale of the corpus (which was not what was contemplated by the testator), the accumulation of rents ought to continue, until

(*a*) *Bulwer* v. *Astley*, 1 Ph. 422; *Playfair* v. *Cooper*, 17 Beav. 187; *Ley* v. *Ley*, 6 Eq. 174; *Re Muffett*, *Jones* v. *Mason*, 39 Ch. D. 534 (purchase-money consisting of a life annuity); and *Re Bacon*, *Grissell* v. *Leathes*, 68 L. T. 522.

(*b*) *Re Leyh's Settled Estates*, [1902] 2 Ch. 274.

(*c*) *Revel* v. *Watkinson*, 1 Ves. sen. 93; *Playfair* v. *Cooper*, 17 Beav. 187.

(*d*) 30 Ch. D. 649; and see also *Re Harrison*, *Townson* v. *Harrison*, 43 Ch. D. 55.

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such a sum was obtained as would be equal to the amount raised by the sale; and that the sum thus obtained ought to be employed in recouping the inheritance, the tenant for life receiving only the interest of it. PEARSON, J., however, decided in favour of the tenant for life, on the ground that the mortgage debts had been paid in a way different from that which the testator intended—that he had not provided for that event, and that consequently the ordinary rule as to the incidence of capital charges must govern the case.

Where, however, on the expiration of a lease granted by the settlor, the tenant for life is obliged to pay compensation for improvements to the outgoing lessee *under a covenant in the lease*, he has no claim to saddle the compensation on corpus. For as JESSEL, M.R., said: "If he lives long enough he will let the land again, and get the outlay from the incoming tenant, and so if he recovered it now he would be repaid twice over" (*e*). However, this does not apply to compensation payable under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), as the incidence of such compensation is expressly provided for by s. 29 of that Act.

Calls on shares.

Calls on shares which form part of a trust estate, are outgoings attributable to capital and not to income, and are accordingly payable out of corpus (*f*).

SUB-PARAGRAPH (b).

Current annual charges.

All charges of an annual character, except annual charges to secure capital sums, are payable out of income; for otherwise the corpus would inevitably decrease year by year, and would ultimately be swallowed up. Thus, the income must bear rates and taxes (*g*); the rent payable for, and the expenses incident to the observance and performance of the covenants and conditions in relation to lease-

(*e*) *Mansel* v. *Norton*, 22 Ch. D. 769.
(*f*) *Todd* v. *Moorhouse*, 19 Eq. 69.
(*g*) *Fountaine* v. *Pellet*, 1 Ves. jun. 337, 342.

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hold hereditaments (*h*). But a tenant for life is not liable to have his income taken for breaches of covenant not occurring in his time (*i*). It would seem that even the cost of complying with a sanitary notice under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), or a dangerous structure notice under the London Building Act, 1894 (*k*), are payable by the tenant for life; but not, apparently, the cost of a thorough reconstruction of the sewers of a house (*l*). In the United States of America it has been held (and it is conceived rightly) that an extraordinary tax in relation to matters which have increased capital value such as a tax for betterment, or for making up a highway, is chargeable to corpus (*m*). Of course annuities charged on income (*n*), the commission or poundage payable to a receiver, and the expenses incident to the preparation and passing of his accounts must be borne by income (*o*). So where a life policy forms part of the settled property, the premiums are payable in the first instance out of income and not capital (*p*); but are, it would seem, repayable to the tenant for life when the policy falls in with interest at four per cent. (*q*). On the same ground, where a rentcharge is redeemed by the tenant for life, he is only entitled to be recouped, out of corpus, the amount paid, less the value of the redemption to his life estate (*r*). Where trustees are directed to insure the trust property against loss or damage by fire, the premiums must be borne by income. Up to the end of 1888, it was questionable whether trustees could lawfully

(*h*) *Re Gjers*, *Cooper* v. *Gjers*, [1899] 2 Ch. 54; *Re Betty*, *Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821; *sed cf. Re Tomlinson*, *Tomlinson* v. *Andrew*, [1898] 1 Ch. 232.

(*i*) *Re Betty*, *Betty* v. *Att.-Gen.*, *supra*.

(*k*) *Re Copland's Settlement*, *Johns* v. *Carden*, [1900] 1 Ch. 326; and *Re Lever*, *Cordwell* v. *Lever*, [1897] 1 Ch. 32.

(*l*) *Re Thomas*, *Weatherall* v. *Thomas*, [1900] 1 Ch. 319; and see *infra*, pp. 203 *et seq.*

(*m*) *Tupper* v. *Fuller*, 7 Rich. Eq. 107; *Varney* v. *Stevens*, 22 Mex. 331; *Harvard College* v. *Alderman*, 104 Mass. 470; *Plympton* v. *Dispensary*, 106 *ib.* 544.

(*n*) *Playfair* v. *Cooper*, 17 Beav. 187, 193; *Miller* v. *Huddleston*, 3 Mac. & G. 513.

(*o*) *Shore* v. *Shore*, 4 Drew. 501.

(*p*) *Re Waugh's Trusts*, 25 W. R. 555.

(*q*) *Re Morley*, *Morley* v. *Haig*, [1895] 2 Ch. 738.

(*r*) *Re Duke of Leinster*, 21 L. R. Ir. 152.

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expend trust moneys in insuring against loss or damage by fire. However, by s. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees are authorised to make such insurances to an amount not exceeding three-fourths of the value of the building or property insured, and to pay the premiums out of income; but the section does not apply to simple trusts.

Losses on trust business.

Where a business is vested in trustees in trust for successive tenants for life and remainderman, the net losses on one year's trading must, *under ordinary circumstances*, be made good out of the profits of subsequent years, and not out of capital (*s*). For the outgoings of a business are part of the regular current expenses, and there can be no profits until all losses are paid, whether such losses are incurred in a year in which gross profits exceed the losses, or were incurred in prior years. The same rule, however, does not seem to apply where a business is not carried on under a direction in the settlement, but is merely carried on temporarily until it can be sold profitably. In such cases, the annual loss or profit (if any) ought to be apportioned between capital and income as follows: Calculate the sum which, put out at interest at four (qu. three) per cent. per annum on the day when the business ought to have been sold (if it could have been) and accumulated at compound interest at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year. The sum so ascertained will be charged against, or credited to, capital, and the rest of the loss will be charged against, or the rest of the profit will be credited to, income (*t*).

Secus where intention can be implied that losses shall be borne by capital.

However, where, on the facts, it appears to have been the settlor's intention that losses on a trust business should be borne by capital, effect will be given to that intention. For instance, where partners carry on a business, each partner having the right to bequeath his share, *and it has*

(*s*) *Upton* v. *Brown*, 26 Ch. D. 588.
(*t*) *Re Hengler*, *Frowde* v. *Hengler*, [1893] 1 Ch. 586.

been the partnership custom to write off the losses of unprosperous years from each partner's share of capital, that custom will be continued, even as between a tenant for life and remainderman, in whose favour one of the partners has bequeathed his share (*u*). Art. 38.

Sub-Paragraph (c).

Repairs.

Well-drawn settlements of house property usually provide that the trustees shall keep it in repair, and insured against loss or damage by fire, out of the rents and profits. Where this is omitted, a *legal* tenant for life of freeholds is not compellable to keep property in repair (*x*); and as the court has no jurisdiction (where there is no trust) to make any order charging the cost of repairs, or any part of it, on corpus (*y*), the result is not infrequently extremely embarrassing and prejudicial to all parties (*z*). Indeed, few statutes would be more useful than a well considered one dealing with this subject. Where, however, the legal estate in fee is in trustees (at all events where they have a power of, or trust for sale (*a*)), it would seem that the court has jurisdiction under the principle of salvage (*b*) to make an order empowering them to raise money for making repairs necessary for the preservation of the property (*c*), or even for erecting additional buildings necessary for rendering the property

(*u*) *Gow* v. *Forster*, 26 Ch. D. 672.

(*x*) *Re Cartwright*, *Avis* v. *Newman*, 41 Ch. D. 532, overruling the so-called doctrine of permissive waste. But *aliter* where there is a condition to keep in repair expressly imposed by the settlements (*Woodhouse* v. *Walker*, 5 Q. B. D. 404).

(*y*) *Re De Teissier*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153.

(*z*) The same difficulty occurs in the United States of America, where it is settled that, in the absence of express power, an equitable life tenant cannot be interfered with by the trustee for the purpose of making repairs; and that, on the other hand, if the life tenant makes repairs, he must pay the cost himself (*Thurston* v. *Dickerson*, 2 Rich. Eq. 317; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231).

(*a*) See *per* Chitty, J., *Re De Teissier*, *De Teissier* v. *De Teissier*, *supra*.

(*b*) *Re Willis*, *Willis* v. *Willis*, [1902] 1 Ch. 15; *Re Leyh's Settled Estates*, [1902] 2 Ch. 274.

(*c*) See *per* Cotton and Lindley, L.JJ., *Re Hotchkys*, *Freke* v. *Calmady*, 32 Ch. D. 408; *Re Courtier*, *Coles* v. *Courtier*, 34 Ch. D. 136; but see *contra Hibbert* v. *Cooke*, 1 S. & S. 552; and *Dent* v. *Dent*, 30 Beav. 363.

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tenantable or saleable (*d*), and of apportioning the cost equitably between income and corpus (*e*). Indeed, it has been held that trustees may, without any order, do such repairs to leasehold property as are necessary to prevent a forfeiture of the lease (*f*), and repay themselves out of the income (*f*), but without prejudice to the rights of tenant for life and remainderman *inter se* (*g*); on the ground that trustees may expend money by way of salvage, and have a lien both on income and corpus for expenses properly incurred by them, as will be seen later on (*h*). But although the court has jurisdiction to authorise a charge on the entire estate which is the subject of the settlement for the purpose of raising money for repairs where the legal estate is in trustees, it does not follow that the whole or even any part of the cost of such repairs will be saddled on the corpus. The cases are somewhat obscure as to this, but the following propositions are submitted, viz.:

Property out of repair at commencement of trust.

(1) Where the property was in disrepair when the tenant for life came into possession; then, whatever its tenure may be, the court will not throw the cost exclusively on him, but will sanction a mortgage, equitably apportioning the ultimate cost between corpus and income (*i*). There is, however, no reported case showing how this equitable apportionment will be carried out, but in one case in which the present writer appeared before ROMER, J., in Chambers, that learned judge approved a scheme under which the trustees were to pay for a new roof in a tropical climate (which was estimated

(*d*) *Conway* v. *Fenton*, 40 Ch. D. 512; *Re Household*, *Household* v. *Household*, 27 Ch. D. 553; and see *Drake* v. *Trefusis*, 10 Ch. App. 364; and *Frith* v. *Cameron*, 12 Eq. 169; but *cf. Re De Tabley*, *Leighton* v. *Leighton*, 75 L. T. 328.

(*e*) *Re Hotchkys*, *Freke* v. *Calmady*, *supra*.

(*f*) *Re Fowler*, *Fowler* v. *Odell*, 16 Ch. D. 723.

(*g*) *Re Hotchkys*, *Freke* v. *Calmady*, *supra*.

(*h*) Art. 65, *infra*.

(*i*) *Re Courtier*, *Coles* v. *Courtier*, 34 Ch. D. 136, as explained in *Re Redding*, *Thompson* v. *Redding*, [1897] 1 Ch. 876; *Re Betty*, *Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821, and *Kingham* v. *Kingham*, [1897] 1 I. R. 170; acquiesced in by KEKEWICH, J., in *Re Gjers*, *Cooper* v. *Gjers*, [1899] 2 Ch. 54, contrary to his previous decision in *Re Tomlinson*, *Tomlinson* v. *Andrew*, [1898] 1 Ch. 232.

to last for twenty years only) by a sinking fund extending over that period. And where trustees under a power invested money in the purchase of real estate out of repair, the cost of putting it in repair was thrown exclusively on capital (*k*).

Current repairs of leaseholds.

(2) Where the property was not in disrepair when the tenant for life came into possession, and is of leasehold tenure, the question is governed by the maxim *qui sensit commodum debet sentire et onus ;* and the equitable tenant for life, as he enjoys the income of the property, must perform the conditions of the lease as to repairs (*l*).

Current repairs of freeholds.

(3) But where it is freehold, it would seem that unless the case falls under the provisions as to improvements of the Settled Land Acts, or the settlement expressly or impliedly authorises the trustees to pay for current repairs out of the rents, nothing can be done either by the trustees or the court unless it becomes a clear case of salvage (*m*). In which case it is the duty of the trustees to apply to the court for directions, when the court will equitably apportion the repairs between capital and income (*k*).

Alterations in the nature of repairs under Settled Land Acts.

(4) By s. 13 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), improvements authorised by the Act of 1882, are to include additions to or alterations in buildings reasonably necessary or proper to enable the same to be let, and also the rebuilding of the principal mansion house. But in the latter case the sum to be applied out of capital money is not to exceed one half of the annual rent of the settled land. Under this provision it has been held that although mere repairs and improvements

(*k*) *Re Freman, Dimond* v. *Newburn*, [1898] 1 Ch. 28; but *cf. Re De Tabley, Leighton* v. *Leighton*, 75 L. T. 328.

(*l*) *Kingham* v. *Kingham, supra ; Re Redding, Thompson* v. *Redding, supra ; Re Betty, Betty* v. *Att.-Gen., supra ; Re Gjers, Cooper* v. *Gjers supra ;* and see *Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711, as to re-drainage of a leasehold house being borne by income.

(*m*) *Re Willis, Willis* v. *Willis*, [1902] 1 Ch. 15; *Re Legh's Settled Estates*, [1902] 2 Ch. 274.

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will not amount to a rebuilding of the principal mansion house (*n*), yet reconstruction, alteration, and enlargement of a considerable part of the house may (*o*). For instance, the Act was held to apply where the house had become infested with dry rot, and portions had to be rebuilt in order to save the whole (*p*). It has been likewise held that the substitution of a block floor over concrete for ordinary floor boards in order to keep dry rot out of the basement of a large house let in separate offices, was an alteration reasonably necessary or proper to enable the same to be let (*q*). With regard to the repair of estates belonging to infants absolutely, the reader is referred to the classification made by the late Mr. Kenyon Parker, and set forth in 21 Ch. D., at p. 787, and to the case of *Re Hawker's Settled Estates, Duff* v. *Hawker* (*r*).

Renewal of renewable leases.

By s. 19 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), a trustee of renewable leases may if he thinks fit, and must if required by any beneficiary so to do, use his best endeavours to obtain a renewal; and for that purpose is empowered to surrender existing leases. But where the beneficiary in possession is entitled, under the settlement, without any obligation to renew or to contribute to the renewal, then the Act does not apply unless he gives his consent. The second sub-section provides that—

"If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money

(*n*) *Re de Teissier*, [1893] 1 Ch. 153; *Re Lord de Tabley*, W. N. (1896) 162; *Re Wright*, 83 L. T. 159.
(*o*) *Re Walker's Settled Estate*, [1894] 1 Ch. 189.
(*p*) *Re Legh*, [1902] 2 Ch. 274.
(*q*) *Stanford* v. *Roberts*, [1901] 1 Ch. 440; and see also *Re Clarke's Settlement*, [1902] 2 Ch. 327; *Re Gaskell's Settled Estates*, [1894] 1 Ch. 485; both approved by Court of Appeal in *Re Blagrave's Settled Estates*, [1903] 1 Ch. 560; *Standing* v. *Gray*, [1903] 1 I. R. 49.
(*r*) 66 L. J. Ch. 341.

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required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose."

This section applies to trusts created before, as well as after the Act, but is of course subject to the directions of the settlement. It has been recently held by Kekewich, J., that its object was merely to assist trustees in renewing leases, and in no way affects the ultimate incidence of the expense as between tenant for life and remainderman (*s*).

Fencing of unfenced land.

Where the question arises as to the incidence of the cost, not of mere repairs, but of putting property into a better condition than it was originally in, it would seem that no part of the cost falls on income. Thus, the expense of fencing waste lands granted to a trustee for the benefit of the estate, must be paid out of corpus exclusively (*t*).

Sub-Paragraph (d).

General costs incident to administration.

Legal expenses incident to the administration of a trust almost exclusively fall on capital, unless the settlor has expressly provided for them; for they are for the benefit of all persons interested. Thus, the costs of the appointment of new trustees (*u*), the costs incident to the investment or change of investment of trust funds (*v*), the costs of obtaining legal advice (*w*), and of taking the direction of the court (*x*), the costs of an administration action (*y*), the costs of paying money into court under the Trustee Act, 1893

(*s*) *Re Baring, Jeune* v. *Baring*, [1893] 1 Ch. 61; and see also *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879.

(*t*) *Earl Cowley* v. *Wellesley*, 1 Eq. 656; and see now Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25, and judgment of Kekewich, J., in *Re Verney*, [1898] 1 Ch. 508.

(*u*) *Re Fellows' Settlement*, 2 Jur. (N.S) 62; *Re Fulham*, 15 *ib.* 69; *Ex parte Davies*, 16 *ib.* 882.

(*v*) But *secus* of petition to vary investment of funds in court, see *Equitable, etc. Society* v. *Fuller*, 1 J. & H. 379.

(*w*) *Poole* v. *Pass*, 1 Beav. 600.

(*x*) *Re Elmore*, 9 W. R. 66; *Re Leslie*, 2 Ch. D. 185.

(*y*) *Re Turnley*, 1 Ch. App. 152.

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(56 & 57 Vict. c. 53) (*z*), the costs of bringing or defending actions against third parties for the protection of the estate (*a*), and the like, are all payable out of corpus. On the other hand, where money is paid into court under the Trustee Act, 1893, the costs of all necessary parties to a petition for obtaining an order for the payment of the *income* to the tenant for life have been held to be payable out of income (*b*). But where a testator gave a fund to trustees upon trust for investment in land, which was to be settled to the use of several persons successively for their lives, and the fund was paid into court in *an administration suit*, it was held by MALINS, V.-C., that the costs of a petition by a tenant for life for payment of the dividends to him, were payable out of corpus (*c*). As the Vice-Chancellor said: "If the fund had been invested in land, the tenant for life would simply have entered into possession without incurring the expense of a petition, and I do not see why he should be in a worse position because the fund is in court. The fund remains here for the advantage of all persons interested, and it seems to me that all should bear the costs of this petition."

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47 ART. 39.—*Duty of Trustee to exercise Reasonable Care.*

Trustees are not insurers (*d*), and except where courts of equity have imposed distinct and

(*z*) *Re Whitton's Trusts*, 8 Eq. 352.

(*a*) See *Stott* v. *Milne*, 25 Ch. D. 710; *Hamilton* v. *Tighé*, [1898] 1 I. R. 123; and see also *Re Earl De la Warr's Estates*, 16 Ch. D. 587; and *Re Earl of Berkeley's Will*, 10 Ch. App. 56. And as to defending foreclosure actions and obtaining transferees of the mortgage, see *More* v. *More*, 37 W. R. 414.

(*b*) *Re Marner*, 3 Eq. 432; *Re Evans's Trusts*, 7 Ch. App. 609; *Re Whitton*, 8 Eq. 352; *Re Smith's Trusts*, 9 Eq. 374. The costs of a petition for advice as to the application of income have been ordered to be borne by income: *Anon*, 8 W. R. 333; 2 L. T. 71; *Re T——*, 15 Ch. D. 78. But *secus* as to costs of petition *in an administration suit* for payment of income to tenant for life, which are payable out of corpus: *Longuet* v. *Hockley*, 22 L. T. 198; *Scrivener* v. *Smith*, 8 Eq. 310; but see *Eady* v. *Watson*, 12 W. R. 682, *contra*.

(*c*) *Scrivener* v. *Smith*, *supra*.

(*d*) *Re Hurst*, *Addison* v. *Topp*, 67 L. T. 96.

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stringent duties upon them (which duties are mentioned in the succeeding articles of this chapter), they are only bound to use such due diligence and care in the management of the estate, as men of ordinary prudence and vigilance would use in the management of their own affairs (*e*). The mere fact that a trustee has acted under the advice of his counsel or solicitor will not necessarily excuse him (*f*) where a breach of trust has been committed; nor, on the other hand, does the fact that a trustee is remunerated add to his liability (*g*).

Difficulty of applying the principle.

Although the rule is well settled that a trustee discharges his duty if he manage the trust estate with those precautions which an ordinary prudent man of business would take in managing similar affairs of his own, it is a rule which is not easy of application. The difficulty arises from the fact, pointed out by Lord Blackburn in the leading case of *Speight* v. *Gaunt* (*h*), that "Judges and lawyers, who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash."

The principal cases in which the care demanded of a trustee has been considered, are those arising out of the investment of trust funds; but as the duties of a trustee in regard to investment are of extreme importance, they will be treated of separately in the next article.

(*e*) *Brice* v. *Stokes*, 2 Wh. & Tu. 633; *Massey* v. *Banner*, 1 J. & W. 241; *Bullock* v. *Bullock*, 56 L. J. Ch. 221; *Speight* v. *Gaunt*, 9 App. Cas. 1. As to the protection now accorded to trustees who have *de facto* committed breaches of trust where they have acted honestly and reasonably, see *infra*, Art. 76.

(*f*) *Doyle* v. *Blake*, 2 Sch. & L. 239: *Re Knight's Trusts*, 27 Beav. 45. But it may be evidence of diligence, in cases where the alleged breach is negligence. See *per* Lord Watson, *Re Whiteley*, *Whiteley* v. *Learoyd*, 12 App. Cas. 734, and *Stott* v. *Milne*, 25 Ch. D. 710; and see now also Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35).

(*g*) *Jobson* v. *Palmer*, [1893] 1 Ch. 71.

(*h*) *Supra*.

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Realisation of debts.

It is the duty of a trustee to realise debts owing to the trust estate with all convenient speed (*i*). He should not only press for payment, but, if they are not paid within a reasonable time, should enforce payment by means of legal proceedings (*j*). It has been said that the only excuse for not taking action to enforce payment of such debts is a *well founded* belief, on the trustee's part, that such action would be fruitless; that the burden of proving the grounds of such belief is on the trustee; and that no consideration of delicacy and no regard for the feelings of relatives or friends will exonerate him from this disagreeable duty (*j*). Whether, however, this broad *dictum* is consistent with s. 21 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), (a re-enactment of s. 37 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which curiously enough was not referred to), is respectfully questioned. The late Sir GEORGE JESSEL, M.R., at all events thought that the probable effect of that enactment was to make the question entirely one of *good faith* and not one of *well founded* belief (*k*). And the provisions of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), by which the court is now empowered to relieve trustees against breaches of trust where they have acted honestly and reasonably, would seem to give statutory effect to this view (*l*).

On the other hand, it has been held that a trustee is not bound to commence legal proceedings when, in the exercise of a reasonable discretion, he considers it inexpedient to do so. For instance, in a case where one beneficiary would have been ruined by the immediate realisation of a debt due from him to the trust estate, and the other beneficiaries (his children) would have been seriously prejudiced, the House of Lords held, that the trustee exercised a reasonable discretion in refraining from suing the debtor and in allowing him time, and that the trustee was consequently

(*i*) *Buxton* v. *Buxton*, 1 My. & Cr. 80.

(*j*) *Re Brogden*, *Billing* v. *Brogden*, 38 Ch. D. 546, and *Millars' Trustees* v. *Polson*, 34 Sc. L. R. 798.

(*k*) *Re Owens*, *Jones* v. *Owens*, 47 L. T. 61, and *infra*, p. 212.

(*l*) See *infra*, Art. 76, and *per* KEKEWICH, J., *Re Houghton*, *Hawley* v. *Blake*, [1904] 1 Ch. 622.

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discharged from liability for any consequent losses (*m*). However, the practitioner must be warned, that he would incur the most serious responsibility if he were to advise a trustee to act in a similar manner. For if the dictum cited on the preceding pages (as to the necessity of a well-founded belief) is correct, the *onus* would lie on the trustee, to prove that the *facts were* as he believed them; and the difficulty of proving this (perhaps many years afterwards), is obvious. In all such cases, therefore, the proper course is to issue an originating summons asking the direction of the court (*n*).

Not bound to realise a depreciated investment.

So in *Re Medland, Eland* v. *Medland* (*o*), NORTH, J., held that when a security, proper at the date of investment, subsequently becomes deteriorated, so as to leave no safe margin, it is not *necessarily* the duty of the trustees to call the money in; but they have a discretion, which they must exercise as practical men, with a due regard to all the circumstances, including the position and solvency of the mortgagor. However, this particular matter is now provided for by s. 4 of the Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), by which it is enacted that—

> "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law."

See Sect 34 In. act.

Whether this enactment is retrospective seems doubtful (*p*).

Compounding debts.

Trustees might always release or compound debts due to the trust estate, where they *bonâ fide* and *reasonably* believed that this course was for the benefit of their beneficiaries (*q*). And now by s. 21 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (which is merely a re-enactment

(*m*) *Ward* v. *Ward*, 2 H. L. Cas. 784; and see *Re Hurst, Addison* v. *Topp*, 67 L. T. 96.

(*n*) *Re Brogden, Billing* v. *Brogden*, 38 Ch. D., at p. 556.

(*o*) 41 Ch. D. 476; and see also *Robinson* v. *Robinson*, 1 De G. M. & G. 247; and *Re Chapman, Cocks* v. *Chapman*, [1896] 2 Ch. 763.

(*p*) KEKEWICH, J., held that it was not (*Re Chapman, Cocks* v. *Chapman*, [1896] 1 Ch. 323), but on appeal the Court of Appeal expressed no opinion on that point.

(*q*) *Blue* v. *Marshall*, 3 P. Wms. 381; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.

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of s. 37 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41)), two or more trustees acting together, or a sole acting trustee, *where a sole trustee is, by the settlement, authorised to execute the trusts and powers thereof*, may (1) accept any composition; (2) accept any security, real or personal, for any debt or for any property, real or personal, claimed; (3) allow time for payment of any debt; (4) compromise, compound, abandon, submit to arbitration, or otherwise settle, any account, claim, or thing whatever relating to the trust; and (5) enter into and execute all such agreements, releases, etc., as they or he may deem expedient, *without being responsible for any loss occasioned by any act or thing so done by him or them in good faith*. The exact effect of this enactment has so far not been judicially decided; but, as above stated, the late Sir GEORGE JESSEL, M.R., intimated that "it might have a revolutionary effect on this branch of the law. It looks as if the only question left would be whether the [trustees] have acted in good faith or not" (*r*). In view of the decision in *Re Brogden, Billing* v. *Brogden* (*s*), however, trustees would, in most cases, be ill-advised to act upon this dictum.

The reader is warned that the words "two or more trustees acting together," does not mean that two only of a greater number can exercise the power. One of several executors may, and may even compromise a claim by a co-executor (*t*); but trustees must act jointly. This is probably the explanation of the fact that no reference to this section was made in *Re Brogden*.

Allowing rents to fall in arrear.

Where trustees allowed rents to get in arrear, it was held that they were liable to make good the arrears, though without interest (*u*).

Bankrupt trustee indebted to trust should prove.

Where a trustee, indebted to the trust, becomes bankrupt, it is his duty to prove the debt; and if he neglect to do so he will be liable for the loss, notwithstanding that he may have obtained his certificate (*v*).

(*r*) *Re Owens, Jones* v. *Owens*, 47 L. T. 61. (*s*) 38 Ch. D. 546.
(*t*) *Re Houghton, Hawley* v. *Blake*, [1904] 1 Ch. 622; but *cf. Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413.
(*u*) *Tebbs* v. *Carpenter*, 1 Madd. 291; and see as to interest, *Lawson* v. *Copeland*, 2 B. C. C. 156; *Wiles* v. *Gresham*, 2 Drew. 258; *Rowley* v. *Adams*, 2 H. L. Cas. 725. (*v*) *Orrett* v *Corser*, 21 Beav. 52.

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So, again, where a settlor has, for valuable consideration, covenanted to settle property, a trustee who neglects to enforce the covenant is liable for any loss occasioned thereby (*w*), unless expressly excused by the settlement.

Enforcing covenant against settlor.

Again, it has been held that if a trustee neglect to register the trust instrument (where it requires to be registered), and the settlor is thereby enabled to effect a mortgage on the property, the trustee will be liable (*x*).

Neglect to register in register county.

In the exercise of due diligence, trustees for sale will, of course, use their best endeavours to sell to the best advantage. They should, therefore (in general), abstain from joining with the owners of contiguous property in a sale of the whole together; unless, indeed, such a course would be clearly beneficial to their beneficiaries. For by doing so, they expose the trust property to deterioration on account of the flaws, or possible flaws, in the title to the other property. But "suppose there were a house belonging to trustees, and a garden and forecourt belonging to somebody else, it must be obvious that those two properties would fetch more if sold together than if sold separately. You might have a divided portion of a house belonging to trustees, and another divided portion belonging to somebody else. It would be equally obvious if these two portions were sold together, that a more beneficial result would thereby take place. . . . But in those cases where it is not *manifest on a mere inspection* of the properties that it is more beneficial to sell them together, then you ought to have reasonable evidence that it is a prudent and right thing to do; and that evidence, as we know by experience, is obtained from surveyors and other persons who are competent judges" (*y*).

Joining in sale of contiguous properties.

(*w*) *Woodhouse* v. *Woodhouse*, 8 Eq. 514; and *Re Brogden*, *Billing* v. *Brogden*, *supra*. Where a testator directed that a beneficiary was to lose all interest in the estate if he did not, *at the request of the trustee*, stay all proceedings which he might have instituted for disputing the will, it was held that it was the trustee's duty to make such request (*Re Allen*, *Havelock* v. *Havelock-Allen*, 12 T. L. R. 299).

(*x*) *Macnamara* v. *Carey*, 1 Ir. R. Eq. 9; and as to neglect to give notice to an assurance company of an assignment to the trustees of a policy, see *Kingdon* v. *Castleman*, 25 W. R. 345. But query whether these neglects of a skilled agent would now be held to fall on the trustee.

(*y*) *Per* JESSEL, M.R., *Re Cooper and Allen*, 4 Ch. D. 817.

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"Where trustees for sale are joint owners with a third party, or are reversioners, it is obvious that they may in general join in a sale; for everybody knows that as a general rule (of course there are exceptions to every rule) the entirety of a freehold estate fetches more than the sum total of the undivided parts or the separate value of the particular estate and reversion" (*z*). This view has now received the express sanction of the legislature (*a*).

Depreciatory conditions of sale.

Again, trustees for sale ought not to do any act which will depreciate the property; therefore they ought not *unnecessarily* to limit the title, for no reasonable man would unnecessarily depreciate his own property by such means. The subject of depreciatory conditions was formerly of great importance, because a purchaser might have objected to complete, on the ground that such conditions constituted a breach of trust for which he himself, taking with notice, might be held responsible (*b*). However, since 1888, the state of the law with regard to such conditions has been altered. Now, no sale made by a trustee *can be impeached* at all, unless the beneficiaries prove that the consideration was thereby rendered inadequate; and, after the execution of the conveyance, no such sale can be impeached as against the purchaser, unless the beneficiaries also prove that such purchaser was acting in collusion with the trustee at the time when the contract for sale was made. Moreover, no purchaser can any longer make any requisition or objection on any such ground; and a trustee who is either a vendor or purchaser is not bound to exclude the application of s. 2 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) (*c*). The meaning of this enactment is not, however, so clear as could be desired. Is it intended exclusively to protect purchasers, and to free them from the necessity of taking the objection; or is it also intended to protect the trustee in the event of the beneficiaries suing the trustee

(*z*) *Per* JESSEL, M.R., *Re Cooper and Allen*, 4 Ch. D. 817.
(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13.
(*b*) *Dance* v. *Goldingham*, 8 Ch. App. 902; *Dunn* v. *Flood*, 25 Ch. D. 629; and on appeal, 28 *ibid.* 586.
(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 14, 15.

for breach of trust? The words "no sale shall be impeached," are certainly more apt for expressing the first of such purposes than the second. Yet it is conceived that the trustee would receive the benefit of the doubt if the case should ever arise, and that henceforth the *onus* of proving loss in such transactions will fall upon the beneficiaries. Art. 39.

Improvident sale.

Again, if trustees for sale, or those who act under their authority, fail in reasonable diligence in inviting competition, or if they contract to sell under circumstances of great improvidence or waste, they will be personally responsible (*d*). It is, therefore, the duty of trustees for sale to inform themselves of the real value of the property, and for that purpose to employ, if necessary, some experienced person to value it (*e*). Nor must they give a future option to a person to purchase the estate (*e.g.*, in a lease); for if the estate should increase in value they will have given the increase away, whereas if it should decrease, the person to whom the option is given would not exercise it (*f*).

Improvident purchase.

The same principle holds good in the case of trustees for purchase, who ought to clearly satisfy themselves of the value of the property, and for that purpose to employ a valuer of their own, and not trust to the valuer of the vendor. For a man may *bonâ fide* form his opinion, but he looks at the case in a totally different way when he knows on whose behalf he is acting; and if the trustees rely upon the vendor's valuer, and he, however *bonâ fide*, values the property at more than its true value, they will be liable (*g*).

Trustees for purchase should also take reasonable care that they get a good marketable title, and that they do not, by conditions of sale, bind themselves not to require one (*h*); and they should never purchase without getting the legal

(*d*) *Ord* v. *Noel*, 5 Madd. 438; and *Anon.*, 6 Madd. 10; *Pechel* v. *Fowler*, 2 Anst. 549.

(*e*) *Oliver* v. *Court*, 8 Pr. 127; *Campbell* v. *Walker*, 5 Ves. 678; and see *per* Jessel, M.R., *Re Cooper and Allen*, 4 Ch. D. 816.

(*f*) *Clay* v. *Rufford*, 5 De G. & Sm. 768; and *Oceanic, etc. Co.* v. *Sutherberry*, 16 Ch. D. 236.

(*g*) *Ingle* v. *Partridge*, 34 Beav. 412; and see also *Fry* v. *Tapson*, 28 Ch. D. 268; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331.

(*h*) *Eastern Counties Rail. Co.* v. *Hawkes*, 5 H. L. Cas. 331.

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estate (*i*). Moreover, they should never purchase land merely as a speculation without having money in hand to pay for it (*k*).

Error of judgment.

Even before the Judicial Trustees Act, 1896, gave the court power to excuse a trustee who has acted reasonably and honestly, a trustee was not responsible for a mere error of judgment, if he had exercised a reasonable discretion, and acted with diligence and good faith. Thus, where an executor omitted to sell some foreign bonds for a year after the testator's death, although there was a direction in the will to convert with all reasonable speed, he was held irresponsible for a loss caused by the bonds falling in price; for although the conclusion he came to was unfortunate, yet, having exercised a *bonâ fide* discretion, the mere fact of the loss was not sufficient to charge him (*l*). As to what constitutes a reasonable delay, this depends on the particular circumstances affecting each case. *Primâ facie*, a trustee ought not to delay realisation beyond a year, even where he has apparently unlimited discretion (*m*); and if he procrastinate beyond that period, the *onus* will be cast upon him of proving that the delay was reasonable and proper (*n*).

Theft of trust property.

A trustee will not be liable if the trust property be stolen, provided he has taken reasonable care of it (*o*), even although the thief be his own servant, if, on the facts proved, it appear that the trustee was justified in deputing the custody of the property to such servant (*e.g.*, the manager of a trust business (*p*)). Yet, by a curious anomaly, it has

(*i*) Lew. 440. And as to advancing trust money on a covenant to surrender copyholds, see *Wyatt* v. *Sharratt*, 3 Beav. 498; and as to equitable mortgages generally, *Norris* v. *Wright*, 14 Beav. 291; *Lockhart* v. *Reilly*, 1 De G. & J. 464; and *infra*, Art. 40.

(*k*) *Ecclesiastical Commissioners* v. *Pinney*, [1900] 2 Ch. 736.

(*l*) *Buxton* v. *Buxton*, 1 M. & Cr. 80; and see *Paddon* v. *Richardson*, 7 De G. M. & G. 563.

(*m*) *Sculthorpe* v. *Tipper*, 13 Eq. 232; and as to the propriety of an executor allowing the testator's money invested on mortgage to remain so until wanted, see *Orr* v. *Newton*, 2 Cox, 274; *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

(*n*) See *per* WOOD, L.J., in *Grayburn* v. *Clarkson*, 3 Ch. App. 606, and *Hughes* v. *Empson*, 22 Beav. 181.

(*o*) *Jones* v. *Lewis*, 2 Ves. sen. 240; *Job* v. *Job*, 6 Ch. D. 562.

(*p*) *Johnson* v. *Palmer*, [1893] 1 Ch. 71; and see also *Weir* v. *Bell*, 3 Ex. D. 238.

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been held that a trustee is liable if he is induced by fraud or forgery to hand it over to the wrong person (*q*). It is difficult to understand how this latter rule could have come into being, except upon the false analogy of a trustee to a banker or creditor. As has been shown in this article, a trustee is in the position of a gratuitous bailee; he must take reasonable care of the trust property, and if it is lost or stolen he is discharged from responsibility, provided that he was guiltless of negligence. If, then, a careful trustee is not responsible for property stolen from his custody, upon what conceivable ground should he be held responsible for property obtained from him by false pretences or forgery, which are crimes far more subtle, and against which it is much more difficult to safeguard himself? Since the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), such a technical breach of trust can and ought to be excused by the court (*r*).

Neglect in keeping trust securities.

Where a trustee of a policy of insurance neglected to endorse on it a memorandum of the trust, or to give notice to the office, and subsequently carelessly allowed it to get into the settlor's hands, who mortgaged it to a third party, the trustee was held liable (*s*). Where trustees hold securities payable to bearer, the proper course is to deposit them with their bankers (*t*), and not with their solicitor (*u*), nor with one only of the trustees (*x*), unless for purposes of sale in cases where he is a stockbroker (*y*).

Inventory of chattels.

So a trustee of chattels should make and keep an inventory of them, so that if lost by the neglect or fraud of others, proper evidence of the nature and value of the chattels may be preserved (*z*).

(*q*) See Art. 41, and illustrations thereto, *infra*.
(*r*) See Art. 76, *infra*; *Re Smith*, *Smith* v. *Thompson*, 71 L. J. Ch. 411.
(*s*) *Kingdon* v. *Castleman*, 25 W. R. 345; and see *Barnes* v. *Addy*, 9 Ch. App. 244, and *Hobday* v. *Peters* (No. 3), 28 Beav. 603.
(*t*) *Re De Pothonier*, *Dent* v. *De Pothonier*, [1900] 2 Ch. 529. But *aliter* with regard to non-bearer securities, see Art. 42, p. 240, *infra*.
(*u*) *Field* v. *Field*, [1894] 1 Ch. 425.
(*x*) *Candler* v. *Tillett*, 22 Beav. 257.
(*y*) *Re Gasquoine*, *Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470.
(*z*) *Temple* v. *Thring*, 56 L. J. Ch. 767.

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Neglect to invest trust fund.

A trustee ought to invest moneys in his hands subject to the trust within a reasonable time; and if he omits to do so, he will be charged interest (*a*); and, if the fund be lost, he will be liable to make it good (*b*). *A fortiori* will he be liable where he has left the trust fund in the sole custody of his co-trustee (*c*). And, on similar grounds, trustees ought to accumulate infants' property by way of compound interest (*d*).

Not bound to insure.

A trustee is not bound to insure leasehold premises against loss by fire (*e*); but by s. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees are expressly authorised to do so to an amount not exceeding three-fourths of the value of the property insured, and to pay the premiums out of the income of that property or of any other property subject to the same trusts. The section does not, however, apply to property held on simple trust for beneficiaries absolutely, and is, of course, subject to the express directions (if any) of the settlement.

How far bound to see to repairs.

Trustees are generally bound to see that trust premises do not fall into decay (*f*). But, as we have seen, the cost of repairs is not necessarily thrown exclusively on income (*g*), and trustees should apply to the court for directions as to raising the necessary money (*f*). It has, however, been decided that when *leasehold* houses are held in trust to receive the rents and pay them to A. for life, and after his death in trust for B., the trustees, in order to avoid forfeiture, are entitled to apply the rents in keeping the houses in a proper state (*h*). But this is without prejudice to the ultimate incidence of the costs (*i*).

(*a*) See *Gilroy* v. *Stephen*, 30 W. R. 755; *Stafford* v. *Fiddon*, 23 Beav. 386; and *Re Jones*, *Jones* v. *Searle*, 49 L. T. 91. In *Cann* v. *Cann*, 51 L. T. 770, KAY, J., considered that six months was the maximum period.

(*b*) *Moyle* v. *Moyle*, 2 R. & M. 710.

(*c*) *Lewis* v. *Nobbs*, 8 Ch. D. 591.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43.

(*e*) *Bailey* v. *Gould*, 4 Y. & C. Ex. 221; and *Dobson* v. *Land*, 8 Ha. 216.

(*f*) *Per* COTTON, L.J., *Re Hotchkys*, *Freke* v. *Calmady*, 32 Ch. D. 408.

(*g*) Art. 38, *supra*.

(*h*) *Re Fowler*, *Fowler* v. *Odell*, 16 Ch. D. 723. But see *Re Courtier*, *Coles* v. *Courtier*, 34 Ch. D. 136, and also Art. 64, *infra*.

(*i*) *Re Courtier*, *Coles* v. *Courtier*, *supra*, and *Re Hotchkys*, *Freke* v. *Calmady*, *supra*; and see p. 204, *supra*.

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Mala fides.

Trustees being liable for gross negligence, are *a fortiori* liable where they combine reckless disregard of the interests of their *cestuis que* trusts with *mala fides*. Thus, where one trustee retires from the trust in order, as he thinks, to relieve himself from the responsibility of a wrongful act meditated by his co-trustee, he will be held as fully responsible as if he had been *particeps criminis* (*j*). But to make him responsible it must be proved that the very breach of trust which was in fact committed was not merely the outcome of, or rendered easy by the retirement; but was contemplated by the trustee who retired (*k*).

ART. 40.—*Duty of Trustee in relation to the Investment of Trust Funds.*

(1) A trustee can only lawfully invest trust funds upon securities authorised by the settlement or by statute (*l*); and not upon the latter if the settlement forbids such investment (*m*).

(2) Even with regard to such securities, a trustee is bound to consider whether, having regard to all the circumstances, and to the rules laid down in Arts. 35 and 39, it is prudent to make the investment (*n*). But the mere fact that stock is above par does not necessarily make it improper to purchase it (*o*).

(*j*) *Norton* v. *Pritchard*, Reg. Lib. B. (1844), 771; *Webster* v. *Le Hunt*, 9 W. R. 918; *Palairet* v. *Carew*, 32 Beav. 567; *Clark* v. *Hoskins*, 37 L. J. Ch. 561.

(*k*) *Head* v. *Gould*, [1898] 2 Ch. 250.

(*l*) As to what securities are authorised by statute, see *infra*, pp. 221 *et seq.*

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, p. 221, *infra*.

(*n*) See *per* COTTON and LOPES, L.JJ., in *Re Whiteley*, *Whiteley* v. *Learoyd*, 33 Ch. D. 347; affirmed, 12 App. Cas. 727, and *Hutton* v. *Annan*, [1898] A. C. 289.

(*o*) See Trustee Act, 1893, s. 2, *infra*, p. 224.

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(3) In particular, in investing on mortgage, he should (unless expressly authorised by the settlement)—

(a) accept only a first legal mortgage (*p*) of freehold or copyhold property, which is not of a wasting character (such as brickfields or coal mines) (*q*);

(b) never join in a contributory mortgage (*r*); and

(c) always obtain a report as to the value of the property made by, and act upon the advice as to its propriety *as a trust investment*, of a person whom he reasonably believes to be an able practical surveyor or valuer, instructed and employed independently of the owner of the property; and should never advance more than two-thirds of the value stated in such report (*s*).

(4) A trustee (unless authorised by the settlement) (*t*), must not apply for, or hold any certificate to bearer issued under the authority of—

(a) the Indian Stock Certificate Act, 1863;

(b) the National Debt Act, 1870;

(c) the Local Loans Act, 1875; or

(d) the Colonial Stock Act, 1877 (*u*).

(*p*) *Norris* v. *Wright*, 14 Beav. 291; *Lockhart* v. *Reilly*, 1 De G. & J. 476; and *Swaffield* v. *Nelson*, W. N. (1876), at p. 255; and see *dicta* in *Chapman* v. *Browne*, [1902] 1 Ch. 785.

(*q*) *Re Whiteley*, *Whiteley* v. *Learoyd*, *supra*; *Smethurst* v. *Hastings*, 30 Ch. D. 490. As to copyholds, *Wyatt* v. *Sharratt*, 3 Beav. 498; *Re Turner*, *Barker* v. *Irimey*, [1897] 1 Ch. 536.

(*r*) *Webb* v. *Jonas*, 39 Ch. D. 660; *Re Massingbird*, *Clark* v. *Trelawney*, 63 L. T. 296.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8.

(*t*) See *Re Roth*, *Goldberger* v. *Roth*, 74 L. T. 50.

(*u*) Trustee Act, 1893, s. 7. Nothing in this section, however, is to impose on the Bank of England or of Ireland, or on any person

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(5) Where there is power to invest, such power carries with it the power to vary investments from time to time (*x*).

(6) Where part of a testator's residuary trust estate consists of securities on which the trustees are permitted to invest, they are not bound to convert and then to procure others of the same nature; unless, having regard to all the surrounding circumstances, it would be imprudent to retain them (*y*).

Paragraph (1).

Investments authorised by statute.

The powers of trustees as to investment have been from time to time extended by statutes which are now consolidated in ss. 1—6 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as amended by s. 2 of the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62). By the latter it is enacted that the securities in which a trustee may invest under the powers of the Trustee Act, 1893, shall include any colonial stock registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 to 1900, and with respect to which there have been observed such conditions as the Treasury may by order prescribe. The restrictions in s. 2 (2) of the Trustee Act, 1893, are to apply to such colonial stocks.

The sections of the Trustee Act, 1893, above referred to, are as follows:

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands,

authorised to issue any such certificate, any obligation to inquire whether a person applying for such certificate is or is not a trustee, or to subject them to any liability in the event of their granting such certificate to a trustee, or to invalidate any such certificate if granted.

(*x*) *Re Clergy Orphan Corporation*, 18 Eq. 280; and see also *Re Dick*, *Lopes* v. *Hume-Dick*, [1891] 1 Ch. 423; affirmed, [1892] A. C. 112.

(*y*) See *Ames* v. *Parkinson*, 7 Beav. 379, apparently not even a second mortgage, *Robinson* v. *Robinson*, 1 De G. M. & G. 247; and see also *Re Chapman*, *Cocks* v. *Chapman*, [1896] 2 Ch. 763.

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whether at the time in a state of investment or not, in manner following, that is to say :

(a) In any of the parliamentary stocks or public funds or government securities of the United Kingdom :

(b) On real or heritable securities in Great Britain or Ireland (*z*) :

(c) In the stock of the Bank of England or the Bank of Ireland :

(d) In India three and a half per cent. stock and India three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India :

(e) In any securities the interest of which is for the time being guaranteed by Parliament (*a*) :

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District :

(g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of *not less than three per centum per annum* on its ordinary stock (*b*) :

(h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company :

(i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India :

(j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State

(*z*) This would seem to include a *mortgage* of ground rents but not a *purchase* of them (*Re Peyton*, 7 Eq. 463).

(*a*) This includes Canadian 4 per cent. stock (Pacific Railway), 36 & 37 Vict. c. 45.

(*b*) See note (*d*), p. 223, *infra*.

in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment (*c*), a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or provisional order:

(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court (*d*),

(*c*) See *Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446.

(*d*) These at present (see R. S. C., Ord. XXII. r. 17) are rather more restricted than the statutory investments, except as to that specified in sub-s. (g) of the Act, with regard to which all that the court requires is that the railway company has paid *a dividend* (not necessarily of 3 per cent.) on ordinary capital for ten years next before the date of

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and may also from time to time vary any such investment (*e*).

2.—(1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate (*f*).

(3) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and

investment. The "City Editor" of "The Times," some years since, stated that "lawyers differ" as to the effect of this, some contending that, with regard to investments open to trustees, the rule of court is governed and restricted by the Act. It is, however, conceived that this is an absurd contention. The Act enumerates a series of investments that are to be permanently permissible, and then, by way of further extension, and certainly not by way of restriction, says that also all stocks, etc. shall be permissible on which the court may for the time being authorise its funds to be invested. *At present* the court permits its funds to be invested on the debenture stocks of railway companies which have paid *any* dividend for ten years past; and therefore it follows, that, *at present*, trustees may follow suit. It is difficult to understand how any lawyer could be of a contrary opinion, which would render sub-s. (o) absolutely meaningless.

(*e*) This applies even where the settlement contains no power to vary (*Re Dick, Lopes* v. *Hume-Dick*, [1891] 1 Ch. 423; affirmed, [1892] A. C. 112; and see *Re Outhwaite, Outhwaite* v. *Taylor*, [1891] 3 Ch. 494). The court, will not, as a rule, interfere with the discretion of trustees as to varying investments (*Lee* v. *Young*, 2 Y. & C. C. C. 532).

(*f*) This, of course, overrides the more stringent restrictions imposed on trustees by the local Acts under which these stocks were formerly made conditional trustee investments.

the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

5.—(1) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent ; and

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

(2) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(5) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

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Investments by Settled Land Act. Trustees.

The foregoing securities refer to ordinary trusts (*g*). Where, however, the trust fund consists of capital money arising under the Settled Land Acts, 1882 to 1890, *or* is money which is liable to be laid out, under the trusts of a settlement, in the purchase of land (*h*), the trustees *must* invest it, *according to the direction of the tenant for life*, in some of the modes specified in s. 21 of the Settled Land Act, 1882; or, *at the option of the tenant for life*, on the securities in which money produced by the exercise of a power of sale in the settlement might be invested thereunder (*i*).

Investments authorised by the settlement itself.

Although the range of trust investments has, as above stated, been greatly increased, the court still scrutinises with considerable jealousy any direction to invest in securities not authorised by parliament. The following examples (which of course turn on the construction of particular settlements) will show how careful a trustee ought to be, before assuming that the language of his settlement really authorises investments which it appears at first sight to do. Thus, where a settlor empowers his trustees to place out the trust fund at interest "at their discretion," it seems to be the better opinion, that the discretion of the trustees is limited to a discretion as to which of the several forms of security *authorised by law* they shall invest in, and does not give them power to invest in securities not so authorised; such, for instance, as ordinary railway stock (*k*). And indeed the word "invest" seems to point to a loan and

(*g*) The Act does not apply to trust funds of a building society (*Re National Permanent Building Society*, 43 Ch. D. 431); but it does to trust funds held by a corporation in trust for a charity (*Manchester Royal Infirmary* v. *Att.-Gen.*, 43 Ch. D. 420).

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 33; and *Re Mackenzie's Trusts*, 23 Ch. D. 750.

(*i*) Settled Land Act, 1882, ss. 22. 33. It is apprehended that, notwithstanding the word "thereunder," trustees, for purposes of the Settled Land Act, would now be authorised to invest in any of the securities permitted by the Trustee Act, 1893 (56 & 57 Vict. c. 53). As to their duties when the tenant for life directs them to invest on a particular mortgage, see *Re Hotham*, *Hotham* v. *Doughty*, [1902] 2 Ch. 575.

(*k*) *Bethell* v. *Abraham*, 17 Eq. 24, *per* JESSEL, M.R.; and see *Re Brown*, *Brown* v. *Brown*, 29 Ch. D. 889, where this principle seems to have been admitted, although under the circumstances the court would not say that the trustees were liable.

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not to an employment in a trading speculation, as also does a direction to place out at *interest* (*l*) or on *security* (*m*).

Where authorised to *retain* shares, must not increase their holding.

Where trustees are authorised to *retain* a settlor's shares in a particular company, it has been held in some cases that they must not accept new shares on reconstruction of the company (*n*). But in a recent case, where the trustee was authorised to continue the estate in its present *form* of investment, Buckley, J., held the contrary (*o*). It is conceived that under no circumstances ought they to increase their holding in the company; so that even if they accept an allotment of bonus shares, they must promptly sell them (*p*). As to the power of the court to permit of a sale of a trust business to a company in consideration of shares, the reader is referred to p. 171, *supra*.

Where authorised to lend to a firm.

On similar grounds, where trustees are authorised to invest money by placing the same in the hands of a specified firm at interest, it is a breach of trust to continue the loan after a change has taken place in the constitution of the firm (*q*).

Government securities and public companies.

On the other hand, in *Cadett* v. *Earle* (*r*), it was held that a direction to invest in foreign government securities authorised an investment in the securities of individual States of the United States of America, although they are not independent nations. And in recent cases it was held that a power to invest in the securities of any "public company" extended to the securities of companies incorporated under the Companies Acts, and was not restricted to companies incorporated by statute or royal charter (*s*); and that a company incorporated by charter under the provisions of a general Act of Parliament was a "company

(*l*) *Bethell* v. *Abraham*, *supra*; and see *Cock* v. *Goodfellow*, 10 Mod. 489; *Dickonson* v. *Player*, C. P., Cooper's Cases, 1837, 1838, p. 178.
(*m*) *Harris* v. *Harris*, 29 Beav. 107; *Murphy* v. *Doyle*, 29 L. R. Ir. 333; *Re Kavanagh*, 27 *ibid.* 495.
(*n*) *Re Morris*, *Bucknill* v. *Morris*, 52 L. T. 462; and see also *Blount* v. *O'Connor*, 17 L. R. Ir. 620.
(*o*) *Re Smith*, *Smith* v. *Lewis*, [1902] 2 Ch. 667.
(*p*) *Re Pugh*, W. N. (1887), p. 143.
(*q*) *Re Tucker*, *Tucker* v. *Tucker*, [1894] 1 Ch. 724; *Smith* v. *Patrick*, [1901] A. C. 282.
(*r*) 5 Ch. D. 710; and see also *Arnould* v. *Grinstead*, 21 W. R. 155.
(*s*) *Re Sharp*, *Rickett* v. *Sharp*, 45 Ch. D. 286.

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incorporated by statute (*t*). But an ordinary joint stock company is not "created by statute" (*u*), nor are unincorporated dock commissioners a "public company or body corporate" (*v*); and it would seem that *primâ facie* a power to invest in public companies is restricted to public companies in the United Kingdom (*x*).

Should never, unless explicitly authorised, invest on personal security.

It must be pointed out that, in the absence of clear direction, trustees (even where they have a discretion) cannot, without breach of trust, lend trust funds on the security of a personal promise, or of personal property, however apparently trustworthy (*y*); and, as Lord KENYON said in *Holmes* v. *Dring*, this "ought to be rung into the ears of every one who acts in the character of trustee" (*z*). It is true that in one case, BACON, V.-C., held, that where trustees were authorised to invest on real or personal security, they might permit money to remain merely on the security of a personal promise or bond (*a*). But it is humbly submitted, that, however this might be if the expression "personal security" stood alone, its juxtaposition in this case with the alternative "real security" ought to have restricted its meaning to "the security of personal property," and that to enlarge it so as to cover the security of a personal promise was scarcely justifiable (*b*). However, it has been held by KEKEWICH, J., that even where the direction is not imperative, trustees may lend on personal security, if satisfied that there is a reasonable prospect of repayment; and may lend to the tenant for life, although his consent to the loan is required (*c*). Of course it is quite clear that where trustees,

(*t*) *Elve* v. *Boyton*, [1891] 1 Ch. 501.
(*u*) *Re Smith, Davidson* v. *Myrtle*, [1896] 2 Ch. 590.
(*v*) *Wood* v. *Middleton*, 76 L. T. 155: as to the securities issued by Scottish Municipal Corporations, see *Hutton* v. *Annan*, [1898] A. C. 289.
(*x*) *Re Castlehow, Lamonby* v. *Carter*, [1903] 1 Ch. 352.
(*y*) *Styles* v. *Gye*, 1 Mac. & G. 423; *Child* v. *Child*, 20 Beav. 50; *Mills* v. *Osborne*, 7 Sim. 30.
(*z*) 2 Cox, 1; *Pocock* v. *Beddington*, 5 Ves. 794; *Potts* v. *Britton*, 11 Eq. 433; *Bethell* v. *Abraham*, 17 Eq. 24; *Ryder* v. *Bickerton*, 3 Sw. 80, n. (a).
(*a*) See *Pickard* v. *Anderson*, 13 Eq. 608, *sed quære*.
(*b*) See *Re Johnson*, W. N. (1886), p. 72.
(*c*) *Re Laing's Settlement, Laing* v. *Radcliffe*, [1899] 1 Ch. 593, *sed quære*.

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authorised to invest on personal security, do so merely for the purpose of accommodating the borrower, and not *bonâ fide* for the benefit of their beneficiaries, they will be liable for any loss, notwithstanding the authorisation (*d*); and *a fortiori* is that so where they lend in consideration of a bribe (*e*). But if the trustees are not merely authorised, but are imperatively directed to invest on certain forms of investment, they are bound to obey the direction, however much they may disapprove (*f*). And also where they are expressly authorised to allow money to remain on an unsatisfactory security *for the purpose of conveniencing a purchaser*, they are justified in doing so (*g*).

Should not invest in trade, or shares of trading companies.

Again, a trustee must not, in the absence of express authority, invest on trade security; as, for instance, in the shares of a public company, which are in reality no security at all, but merely documents conferring a right to speculative profits (*h*). It was on this ground that, before the passing of the Acts of Parliament before referred to, trustees were not entitled to invest even in stock of the banks of England or Ireland, or in the stock of the old East India Company (*i*).

Paragraph (2).

Trustees not necessarily protected by investing in authorised securities.

It is a mistake to suppose that a trustee is free from responsibility if he invests trust funds in some of the securities authorised by the settlement or by statute. To invest in any other securities would, of itself, be a breach of trust; but, even with regard to those which are permissible, he must take such care as a reasonably cautious man would use, having regard, not only to the interests of those who are entitled to the income, but to the interests of those who will take in future. It is not like a man investing his own money, where his object may be a larger present income

(*d*) *Langston* v. *Ollivant*, G. Coop. 33; and see *Stewart* v. *Sanderson*, 10 Eq. 26; and *Francis* v. *Francis*, 5 De G. M. & G. 108.
(*e*) *Re Smith*, *Smith* v. *Thompson*, [1896] 1 Ch. 71.
(*f*) *Cadogan* v. *Essex* (*Lord*), 2 Drew. 227; *Beauclerk* v. *Ashburnham*, 8 Beav. 322. And see now *Re Wedderburn*, 9 Ch. D. 112.
(*g*) *Re Hurst*, *Addison* v. *Topp*, 63 L. T. 665.
(*h*) *Harris* v. *Harris*, 29 Beav. 107; *Cock* v. *Goodfellow*, 10 Mod. 489.
(*i*) *Howe* v. *Lord Dartmouth*, 1 Wh. & Tu. 68.

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than he can get from a safer security. Trustees are bound to preserve the money for those entitled to the corpus in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present; and in doing so, they must use such caution as a reasonably prudent man would use with reference to transactions of a similar nature in which he might be engaged (*k*). Not that this means that a different degree of care is required in regard to the conduct of the business of a trust, according to whether there are persons to take in the future, or whether the trust fund is held in trust for one beneficiary absolutely. The question, in either case, is the due care of the capital sum (*l*); and in either case, the trustee is not allowed the same discretion in investing the trust fund as if he were a person, *sui juris*, dealing with his own estate. His duty, rather, is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide: that is, the kind of business "the ordinary prudent man" is supposed to be engaged in (*m*). Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself not only to the class of investments which are permitted by the settlement or by statute, *but to avoid all* investments of that class which are attended with hazard (*n*).

Illustrations of permissible securities which might be improper under certain circumstances.

Thus, if any of the securities mentioned in the Trustee Act, 1893 (56 & 57 Vict. c. 53), were to become very much depreciated, so as to render them a hazardous investment, the fact that they are made permissible as trust investments by that statute would not, it is conceived, protect a trustee who should invest trust funds upon them. And, *a fortiori*, would this be the case if he were to make such

(*k*) *Per* COTTON, L.J., *Re Whiteley, Whiteley* v. *Learoyd*, 33 Ch. D., at p. 350.

(*l*) *Per* Lord HALSBURY, same case when before H. L.; see 12 App. Cas., at p. 732.

(*m*) *Per* LINDLEY, L.J., *Re Whiteley, supra.*

(*n*) *Per* Lord WATSON, same case, 12 App. Cas., at p. 733.

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an investment for the purpose of procuring a larger income for the tenant for life (*o*). At the same time it must be acknowledged that, save with regard to investments on mortgage, the statutory power is so guarded that it is difficult to foresee any case in which a trustee could be held liable for investing on any of the permitted securities. Formerly it was held, that where a non-British Government stock was above par, and within a few years of redemption at par, it was not a proper investment for trust funds; because the effect of such an investment might be to benefit the tenant for life at the expense of those in remainder (*p*). However, the intention of Parliament, as expressed in the Act of 1893, appears to be to fix a standard of prudence in such cases, viz., that a trustee should not pay more than a premium of fifteen per cent. above the redemption price, and that the period of redemption should be at least fifteen years distant at the date of investment. This clause, no doubt, only refers to the investments in sub-ss. (g), (i), (k), (l), and (m) of s. 1, but, *a fortiori*, a trustee who applied the rule to the other permissible securities would be safe. It may also be mentioned here, that under special circumstances, a change of investment from one which is safe to one which (although permitted) is less safe, for the purpose of affording a larger income to the life tenant, may be proper enough if the trustee acts in good faith: for instance, where property is settled on a parent for life with remainder to his children, and it is very important that the parent should have an increased income for their better support and education (*q*). In such a case, an investment in a redeemable stock above par would not merely benefit the tenant for life, but the remaindermen also. Generally it may (it is conceived) be safely laid down, that where trustees act in good faith, and not collusively for the manifestly sole benefit of the tenant for

(*o*) This even applies to trustees for purposes of the Settled Land Acts (*Re Theobald*, 19 T. L. R. 536).

(*p*) See *Cockburn* v. *Peel*, 3 De G. F. & J. 170; *Ungless* v. *Tuff*, 9 W. R. 727; *Waite* v. *Littlewood*, 41 L. J. Ch. 636.

(*q*) *Cockburn* v. *Peel*, *supra*, *per* TURNER, L.J.; and see *Montefiore* v. *Guedalla*, W. N. (1868), p. 67; *Re Ingram's Trusts*, 11 W. R. 980.

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life, they will not now be held liable for changing a first class security for one which is authorised by the Act, and which pays a better interest (*r*).

Not always justified in investing on mortgage.

Nevertheless, trustees should not invest on mortgage *where it is not reasonable*, merely to accommodate one of their beneficiaries. Still less ought they to do so merely to accommodate an outsider. Thus they would never be justified in lending a sum of stock (and, *a fortiori*, they would not be justified in selling it and lending the proceeds) on mortgage of real estate bearing interest at the same rate as the stock itself. For no possible benefit could accrue to the beneficiaries; and, on the other hand, the security of the government would be changed for the less reliable security of private property. Consequently, such a transaction would afford the strongest presumption of an intention to accommodate the mortgagor (*s*).

PARAGRAPH (3).

Precautions to be observed by trustees who invest on mortgage.

As above stated, trustees are not freed from responsibility because they invest on authorised securities; but more especially is this the case when they lend trust funds on the security of a mortgage. The very simplicity of the authority, empowering them to invest on "real securities," is apt to mislead, and gives no indication of the severity with which the court regards such loans. In the first place, in the absence of express authority, trustees who desire to invest on mortgage, are restricted to *first legal mortgages of land*. The mortgage should be a first mortgage (*t*), because otherwise trustees might not have funds available to redeem a prior incumbrancer who might

First legal mortgage alone permissible.

(*r*) See *per* TURNER, L.J., in *Cockburn* v. *Peel*, *supra*; and *per* KEKEWICH, J., in *Re Walker*, *Walker* v. *Walker*, 62 L. T. 449.

(*s*) *Whitney* v. *Smith*, 4 Ch. App. 521; and see also *Re Walker*, *Walker* v. *Walker*, 62 L. T. 449, where trustees were held liable for varying investments without any reasonable cause.

(*t*) *Norris* v. *Wright*, 14 Beav. 291; and *Lockhart* v. *Reilly*, 1 De G. & J. 464; and *dicta* in *Chapman* v. *Browne*, [1902] 1 Ch. 785; and see also *Worman* v. *Worman*, 43 Ch. D. 296, where it was held that trustees with power to *purchase* real estate, must not purchase an equity of redemption. But see *contra*, *per* WRIGHT, J., *Want* v. *Campain*, 9 T. L. R. 254.

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threaten to foreclose. It should be a *legal* mortgage (*u*), because the protection afforded by the legal estate prevents any prior incumbrancer, of whom the trustees may have no notice, getting priority over them; and if trustees do invest in a mere equitable mortgage (for instance, a mortgage by way of covenant to surrender copyholds (*x*)), and any loss accrues, they will, it is apprehended (although this has never been expressly decided), be liable to make it good (*y*). It would seem, however, that there is no objection to the security being a sub-mortgage, as the trustees get the legal estate and in effect the additional security of the covenant of the original mortgagor (*z*). Unless the settlement expressly authorised a mortgage of leaseholds, trustees could formerly only properly advance trust funds on the security of freeholds or copyholds; because the statutes which empowered trustees to invest on mortgage, confined them to mortgages of *real* estate; and leaseholds, however long and however free from rent and covenants, were not *real* estate (*a*). However, as above stated (*b*), s. 5 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), authorises investment on mortgage of certain long leaseholds held at nominal rents.

Must not join in a contributory mortgage.

In the second place, the mortgage must not be a contributory mortgage, that is, a mortgage where the trustees join with other persons in a joint loan; for, in that case, the trustees would be putting it out of their power to realise without the joinder of third parties. In other words, they would be entrusting the trust property to persons who were not trustees of it. A contributory mortgage is therefore *primâ facie* a breach of trust (*c*).

(*u*) *Swaffield* v. *Nelson*, W. N. (1876), p. 255.
(*x*) Lew. 328.
(*y*) See *Norris* v. *Wright*, *supra*; *Drosier* v. *Brereton*, 15 Beav. 221; *Lockhart* v. *Reilly*, *supra*; *Swaffield* v. *Nelson*, *supra*; and *dicta* in *Chapman* v. *Browne*, *supra*.
(*z*) *Smethurst* v. *Hastings*, 30 Ch. D. 490.
(*a*) *Leigh* v. *Leigh*, 35 W. R. 121; *Re Boyd's Settled Estates*, 14 Ch. D. 626; but see as to long terms at peppercorn rents, *Re Chennell*, *Jones* v. *Chennell*, 8 Ch. D. 492.
(*b*) *Supra*, p. 225.
(*c*) *Webb* v. *Jonas*, 39 Ch. D. 660; *Re Massinghird*, *Clark* v. *Tretawney*, 63 L. T. 296; *Stokes* v. *Prance*, [1898] 1 Ch. 212.

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Precautions formerly necessary as to ascertaining value of property.

In the third place, they must take precautions not to advance too much money on the security offered. The law on this point was altered in favour of trustees by s. 4 of the Trustee Act, 1888 (51 & 52 Vict. c. 59) (now repealed, and re-enacted in s. 8 of the Trustee Act, 1893). Before December 24th, 1888, the duty of a trustee who was proposing to advance money on mortgage was as follows: He was bound (as he still is) to ascertain the real value of the property, and for that purpose to employ a valuer and solicitor (*d*) of his own, and not trust to the valuer of the mortgagor (*e*); and to instruct such valuer that the valuation was required for the purpose of considering the advisability of investing trust funds on the security of the property (*f*). For a man may *bonâ fide* form his opinion, and yet look at the case in a totally different way when he knows on whose behalf he is acting. Moreover, he was (as he still is) bound to exercise his own judgment in the selection of the valuer, and not leave it to his solicitor (*g*). In the next place, he was not entitled to advance more than two-thirds of the amount at which the property was valued (*h*) (and that is still the same); and if it were house property not more than one-half (*i*); and if it were trade property, the value of which depended on the continued prosperity of the trade, it would have been hazardous to advance even so much as that (*k*). If he did invest on the security of real property used for trade purposes, he was bound to altogether disregard the value of the trade (*l*).

(*d*) *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331.

(*e*) *Fry* v. *Tapson*, 28 Ch. D. 268; *Walcott* v. *Lyons*, 54 L. T. 786; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331; *Ingle* v. *Partridge*, 34 Beav. 412.

(*f*) See *per* KAY, J., *Re Olive*, *Olive* v. *Westerman*, 34 Ch. D. 70.

(*g*) *Fry* v. *Tapson*, *supra*; and see on all the points, *Re Somerset*, *Somerset* v. *Lord Poulett*, 68 L. T. 613; varied by Court of Appeal, [1894] 1 Ch. 231.

(*h*) *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Drosier* v. *Brereton*, 15 Beav. 221; *Re Godfrey*, *Godfrey* v. *Faulkner*, 23 Ch. D. 483.

(*i*) *Budge* v. *Gummow*, 7 Ch. App. 719; *Stretton* v. *Ashmall*, 3 Drew. 12; *Smethurst* v. *Hastings*, 30 Ch. D. 490; *Stickney* v. *Sewell*, *supra*: *Re Olive*, *Olive* v. *Westerman*, 34 Ch. D. 70. As to cottage property, see *Re Salmon*, *Priest* v. *Uppleby*, 42 Ch. D. 351.

(*k*) *Stretton* v. *Ashmall*, *supra*; *Royds* v. *Royds*, 14 Beav. 54; *Walcott* v. *Lyons*, 54 L. T. 786.

(*l*) *Re Whiteley*, *Whiteley* v. *Learoyd*, 12 App. Cas. 727.

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However, these proportions were not inflexibly observed; and if, when the advance was made, the property was approximately up to the standards above indicated, trustees were not held liable for subsequent deterioration (*m*).

Precautions as to value prescribed by Trustee Act, 1893.

By s. 8 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which applies to all mortgages made since December 24th, 1888, the duty of a trustee under such circumstances is considerably lightened. By that section it is enacted that—

"(1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer (*n*) instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

Digest of the precautions as to value now to be observed.

It will be seen, therefore, that the Act makes a very considerable alteration in the law; and it is apprehended that in future a trustee (*o*) advancing trust money on mortgage will be safe if he observes the following particulars, viz.:

(1) He must act on the valuation and report of a surveyor or valuer; not necessarily a local one;

(2) He must have reasonable grounds for believing the surveyor or valuer to be an able practical man. For this purpose it is apprehended that the trustee

(*m*) *Re Godfrey, Godfrey* v. *Faulkner, supra; Re Olive, Olive* v. *Westerman, supra.*

(*n*) The words "reasonably believed" do not refer to the words "instructed and employed" (*Re Walker, Walker* v. *Walker*, 62 L. T. 449; *Re Somerset, Somerset* v. *Lord Poulett*, 68 L. T. 613).

(*o*) With regard to trustees for purposes of the Settled Land Acts investing on a particular mortgage by the direction of the tenant for life, the rule is somewhat modified. As to this, see *Re Hotham, Hotham* v. *Doughty*, [1902] 2 Ch. 575.

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must still exercise his own judgment, and not trust blindly to the nomination of his solicitor without inquiry;

(3) The surveyor must not be the surveyor of the mortgagor in the matter;

(4) The surveyor must be instructed by the trustee to make the valuation *for him;* and it is apprehended that his instructions should state that the trustee requires a valuation for the purpose of considering the advisability of investing trust funds on the security of the property;

(5) The surveyor must not merely value the property, but must *advise the trustee that the property is a proper investment for the money proposed to be lent;*

(6) The trustee must not lend more than two-thirds of the surveyor's valuation, but he may lend that much, irrespective of the tenure of the property, or the purposes for which it is used.

Statutory precautions only relate to value, and not to the nature of the security.

It must, however, be borne in mind that the Act merely says that if the above precautions are taken a trustee shall not be liable for breach of trust by reason *only of the proportion* borne by the amount of the loan to the value of the property. Therefore, a trustee would still be liable for advancing the money on property of a speculative character (such as a manufactory, a brickfield (*p*), or a china clay field (*q*)); not on the ground that he advanced too large a sum, but that he ought not to have advanced trust money on such a security at all (*r*).

Duty of trustees with regard to title of property mortgaged to them.

But in addition to getting a legal first mortgage of property of a proper value, the trustee was formerly bound to see that the mortgagor had a good legal title free from incumbrances (other than rentcharges created under the Drainage Acts or the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114)). Here, again, the burden on the

(*p*) *Re Whiteley, Whiteley* v. *Learoyd*, 12 App. Cas, 727.
(*q*) *Re Turner, Barker* v. *Trimey*, [1897] 1 Ch. 536.
(*r*) *Jones* v. *Julian*, 25 L. R. Ir. 45. Consider *Re Walker, Walker* v. *Walker*, 62 L. T. 449.

shoulders of a trustee has been lightened by s. 8 of the Trustee Act, 1893 (re-enacting s. 4 of the repealed Act of 1888), by which it is enacted that— Art. 40.

"(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

"(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

"(4) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

Lastly, trustees should not enter into any arrangement with the mortgagor for the continuance of the loan for a period of years (*s*); for they would thereby fetter themselves in the event of it being desirable (by reason of depreciation of the land or otherwise) to realise. Must not engage not to realise for a long period.

Art. 41.—*Duty of Trustee to see that he pays Trust Moneys to the right Persons.*

(1) The responsibility of handing the trust property to the persons entitled formerly fell upon the trustee; mistake (*t*) or fraud was no excuse. The court has now power to excuse such a mistake made honestly and reasonably (*u*);

(*s*) *Vicery* v. *Evans*, 36 Beav. 376.

(*t*) *Re Hulkes*, *Powell* v. *Hulkes*, 33 Ch. D. 552; as to fraud, see *Re Bennison*, *Cutler* v. *Boyd*, 60 L. T. 859. See comments on this rule, p. 217, *supra*.

(*u*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3, as to which see *infra*, Div. V., Chap. II

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but, nevertheless, in cases of doubt the trustee should apply to the court for its direction (*x*).

(2) If, however, the person who is really entitled to trust property is not the beneficiary who appears on the face of the settlement (but someone who claims through him), and the trustees, having neither express nor constructive notice of such derivative title, pay upon the footing of the original title, they cannot be made to pay over again (*y*).

PARAGRAPH (1).

Forged authority.

Thus, where a trustee made a payment to one who produced a forged authority from the beneficiary, the trustee, and not the beneficiary, had to bear the loss. For, as was said by Lord NORTHINGTON (*z*), "a trustee, whether he be a private person or a body corporate, must see to the reality of the authority empowering him to dispose of the trust money; for if the transfer is made without the authority of the owner, the act is a nullity."

False certificate.

So, again, trustees who paid over the trust fund to wrong persons, upon the faith of a forged marriage certificate, were made responsible for so much of the trust fund as could not be recovered from those who had wrongfully received it (*a*). The question whether an honest and reasonable mistake as to the nature of a forged document, or as to the construction of an obscure one would now be excused under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), is discussed *infra*, Art. 76.

Honest and reasonable mistake.

(*x*) *Talbot* v. *Earl Radnor*, 3 M. & K. 252; *Merlin* v. *Blagrave*, 25 Beav. 125; *Ashby* v. *Blackwell*, 2 Eden, 302; *Eares* v. *Hickson*, 30 Beav. 136; *Sporle* v. *Burnaby*, 10 Jur. (N.S.) 1142.

(*y*) *Cothay* v. *Sydenham*, 2 Br. Ch. Ca. 391; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91.

(*z*) *Ashby* v. *Blackwell*, *supra*; but see *Re Smith*, *Smith* v. *Thompson*, 71 L. J. Ch. 411.

(*a*) *Eares* v. *Hickson*, *supra*; and see also *Bostock* v. *Floyer*, 1 Eq. 26, and *Sutton* v. *Wilders*, 12 Eq. 373.

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A trustee who, by mistake, pays the capital to the tenant for life, instead of investing it and paying him the income only, will in general have to make good the loss to the estate; although he will, as will be seen hereafter, be entitled to be recouped out of the life estate (*b*). And similarly, trustees who have distributed a trust fund upon what turns out to be an erroneous, although *bonâ fide*, construction of the trust instrument, have hitherto been held liable to refund the property distributed, together with interest thereon at four (probably now, three) per cent. (*c*).

Mistake as to construction of settlement.

Formerly, a trustee who paid trust money to the attorney of a beneficiary, was liable, if it turned out that the power was revoked by death of the beneficiary or otherwise. However, by s. 23 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (re-enacting 22 & 23 Vict. c. 35, s. 26), it was enacted that—

Paying under power of attorney.

"A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."

PARAGRAPH (2).

In *Leslie* v. *Baillie* (*d*), a testator who died, and whose will was proved in England, bequeathed a legacy to a married woman whose domicile, as well as that of her husband, was in Scotland. The husband died a few months after the testator. After his decease, the executors of the testator paid the legacy to the widow. It was proved that,

Not bound to know of derivative title.

(*b*) *Barratt* v. *Wyatt*, 30 Beav. 442; *Davies* v. *Hodgson*, 25 Beav. 177; *Griffiths* v. *Porter*, *ibid.* 236.

(*c*) *Hilliard* v. *Fulford*, 4 Ch. D. 389; and see also *Re Ward*, *Bemment* v. *Balls*, 47 L. J. Ch. 781; and *Re Hulkes*, *Powell* v. *Hulkes*, 33 Ch. D. 552.

(*d*) 2 Y. & C. C. C. 91; and see also *Re Cull's Trusts*, 20 Eq. 561.

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according to the Scotch law, the payment should have been made to the husband's personal representatives. It was, however, held, that in the absence of proof that the executors of the settlor knew the Scotch law on the subject, the payment to the widow was a good payment.

So where a solicitor for A. receives, and according to A.'s directions disposes of, the proceeds of property, without notice that in reality A. has settled the property, he is not liable to the beneficiaries (*e*).

Disputes between beneficial claimants.

Trustees are not bound to hand over the trust fund to the mortgagee of their beneficiary, where accounts are pending between the mortgagee and mortgagor (*f*).

Effect of not searching for notices of incumbrances.

On the other hand, a new trustee is liable to make good moneys paid by him *bonâ fide* to a beneficiary, if the papers relating to the trust comprise a notice of an incumbrance created by that beneficiary depriving him of the right to receive the money. For if the trustee had acquainted himself, as he was bound to do, with the trust documents and papers, he would have found what the true state of the case was (*g*). Where, however, no amount of search would have disclosed the notice, the trustee would of course not be liable, as his liability entirely depends upon his shirking the duty of search, which the law casts upon him (*g*).

ART. 42.—*Duty of Trustee not to delegate his Duties or Powers.*

(1) A trustee may not delegate his duties or powers (or *a fortiori*, the receipt of trust moneys)

(*e*) *Williams* v. *Williams*, 17 Ch. D. 437.

(*f*) *Hockey* v. *Western*, [1898] 1 Ch. 350.

(*g*) *Hallows* v. *Lloyd*, 39 Ch. D. 686. This is so even where the trustees have a discretion to pay the income to or for the benefit of the assignor, "his wife or children," if they do in fact pay it to the assignor: *Re Neil*, *Hemming* v. *Neil*, 62 L. T. 649. See also *Burrows* v. *Lock*, 10 Ves. 470, and *Re Coleman*, *Henry* v. *Strong*, 39 Ch. D. 443.

either to a stranger (*h*) or to his co-trustee (*i*), save only Art. 42.

(a) where authorised by the settlement (*k*), or by statute (*l*) ;

(b) where obliged to do so from necessity, acting conformably to the common usage of mankind, and as prudently as if acting for himself (*m*), and the agent is employed in the ordinary scope of his particular business (*n*) ;

(c) where the delegated act is merely ministerial, and involves no personal discretion (*o*).

(2) But even where a trustee may safely permit another to receive trust property, he will not be justified in allowing it to remain in such other person's custody without due inquiry (*p*), for a longer period than the circumstances of the case require (*q*).

Paragraph (1).

This rule is founded on the maxim *delegatus non potest delegare*. It is therefore an invariable rule that, even in cases where a trustee may employ an agent, he must still exercise his own judgment on every question, and must not General principle.

(*h*) *Adams* v. *Clifton*, 1 Russ. 297 ; *Chambers* v. *Minchin*, 7 Ves. 186 ; *Wood* v. *Weightman*, 13 Eq. 434 ; *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.

(*i*) *Langford* v. *Gascoyne*, 11 Ves. 333 ; *Clough* v. *Bond*, 3 M. & C. 497 ; *Cowell* v. *Gatcombe*, 27 Beav. 568 ; *Eares* v. *Hickson*, 30 Beav. 136 ; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.

(*k*) *Kilbee* v. *Sneyd*, 2 Moll. 199 ; *Doyle* v. *Blake*, 2 Sch. & L. 239.

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (3).

(*m*) *Speight* v. *Gaunt*, 9 App. Cas. 1 ; *Ex parte Belchier*, Amb. 218 ; *Clough* v. *Bond*, 3 M. & C. 497 ; *Bennett* v. *Wyndham*, 4 De G. & J. 257.

(*n*) *Fry* v. *Tapson*, 28 Ch. D. 268.

(*o*) Sug. Pow. 179 ; Farwell, Pow. 358, 360.

(*p*) *Carruthers* v. *Carruthers*, [1896] A. C. 659.

(*q*) *Brice* v. *Stokes*, 2 Wh. & Tu. 633 ; *Gregory* v. *Gregory*, 2 Y. & C. C. C. 313 ; *Re Fryer*, 3 K. & J. 317 ; *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

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give the agent *carte blanche* to do what he may think fit (*r*).

The general principle as to the impropriety of delegating fiduciary duties and powers has been modified, both by judicial decisions and by statute. The Act 22 & 23 Vict. c. 35, s. 31 (now repealed and re-enacted by s. 24 of the Trustee Act, 1893), enacted that—

"a trustee shall (without prejudice to the provisions of the instrument, if any, creating the trust) be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be accountable only for his own acts, receipts, neglects, or defaults, *and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited.*"

Effect of statutory modification.

This statute, however (as was pointed out by Lord SELBORNE, in the leading case of *Speight* v. *Gaunt* (*s*)), does not authorise a trustee, at his own mere will and pleasure, to delegate the execution of the trust and the custody of the trust moneys to strangers in the absence of a moral necessity from the usage of mankind for the employment of such an agency. Indeed, the only effect of the section appears to be, to shift the *onus* of proof from the trustee to the beneficiaries; so that whereas formerly it lay upon a trustee whose conduct was impugned to prove that he had acted from necessity according to ordinary business usage, it now lies on the beneficiaries, who make a charge of breach of trust, to prove that the trustee did not act from necessity or conformably to the universal custom (*t*).

Opinion of KEKEWICH, J., as to trustee's liability for his agents.

The question was treated with great perspicuity by KEKEWICH, J., in the case of *Re Weall, Andrews* v. *Weall* (*u*), where his lordship said: "Consider for a moment the position of that special agent called a trustee as regards the position of sub-agents. He certainly has the right to appoint them, if and so far as the work of the trust reason-

(*r*) See *Re Weall, Andrews* v. *Weall*, 42 Ch. D. 674.
(*s*) 9 App. Cas. 1.
(*t*) See *Re Brier, Brier* v. *Erison*, 26 Ch. D. 238.
(*u*) 42 Ch. D. 674.

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ably requires. For instance, he may appoint a broker to make or realise investments, or a solicitor to do legal business; and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as pointed out in the well-known case of *Speight* v. *Gaunt* (*r*), reasonableness; and reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in the choice of his agents, but, so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is *his* conclusion—that is the outcome of such consideration as might reasonably be expected to be given to a like matter, by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs."

Trustee may consult his beneficiaries.

It must also be pointed out, that although trustees must always exercise their own judgment, and not surrender it to agents and, *a fortiori*, not to beneficiaries, yet they are not debarred from inquiring what are the wishes and opinions of any of the parties interested. As Lord SELBORNE said in *Fraser* v. *Murdoch* (*x*): "In this case, I find no indication of an improper purpose. . . . It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, in the end, objections to which they had thought it right in the first instance to direct attention."

(*r*) 9 App. Cas. 1.

(*x*) 6 App. Cas. 855.

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Must not leave trust business entirely to co-trustee.

Nevertheless, although a trustee may listen to the opinions and wishes of others, he must exercise his own judgment. Thus a trustee for sale of ordinary property, who leaves the whole conduct of the sale to his co-trustee, cannot shield himself from responsibility for the latter's negligence by saying that he left the matter entirely in his hands (*y*). For the settlor has entrusted the trust property and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience (*z*).

Should not associate a stranger in the management.

Conversely, a trustee must not associate with himself another person (who is not one of the trustees) in the management of the trust estate. For the settlor has trusted him, and not the other person; and by allowing the latter to have the joint control of the property, the trustee puts it out of his own power to deal with it promptly and effectually in case of necessity (*a*).

Choice of advisers.

So, again, where trust property has to be valued for the purposes of sale, or property offered to trustees as a security for trust money has to be valued, or trust money has to be invested—the trustees must themselves choose the valuer or broker, and must not delegate that duty to their solicitors, nor even to one of themselves (*b*). No doubt trustees can employ a solicitor for legal matters which the trustee is not competent to undertake, for that is *necessary;* but the choice of a broker or valuer is not properly the business of solicitors, but is a matter on which a trustee should exercise his own judgment (*c*). Of course, it must be understood that this does not preclude a trustee from asking advice or information as to the character of a broker, valuer, or other necessary agent, or from asking his solicitors to submit the names of such. All that is meant is, that he must judge for

(*y*) *Oliver* v. *Court*, 8 Pr. 127; *Re Chertsey Market*, 6 Pr. 285; *Hardwick* v. *Mynd*, 1 Anst. 109; *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*z*) See *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121.

(*a*) *Salway* v. *Salway*, 2 R. & M. 215; *White* v. *Baugh*, 3 Cl. & Fin. 44. As to permitting their solicitor or one of themselves to have the custody of bearer bonds, see *infra*, p. 253.

(*b*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*c*) See *per* KAY, J., in *Fry* v. *Tapson*, 28 Ch. D. 268.

himself on the facts reported to him to guide his choice, and must not delegate the duty of choosing the agent either to his solicitors or to anyone else. In any case he should not choose an "outside" broker (*b*). Art. 42.

A power of leasing cannot be delegated, for in its exercise much judgment is required. The fitness and responsibility of the lessee, the adequacy of the rent, the length of the term to be granted, and the nature of the covenants, stipulations, and conditions which the lease should contain, are all matters requiring knowledge and prudence (*d*). On similar grounds, a trustee cannot delegate (as, for instance, by power of attorney) the execution of a trust or power to sell property. For the settlor has placed confidence in his discretion as to price and conditions, and it is a breach of that confidence to pitch-fork the entire business on to another person, without retaining any control or authority over it (*e*). On the other hand, a trustee may appoint an attorney merely to pass the legal estate, as such an act involves no discretion (*f*). So where trustees had power to elect a clergyman, it was held that they could not appoint proxies *to vote;* but when the choice was once made, they could appoint proxies for the purpose of signing the formal presentation (*g*). However, the rule yields to necessity, and trustees may appoint an attorney to act for them in a foreign country, even in matters involving judgment and discretion (*h*). Power to lease, sell, etc.

On the other hand, where the property is of a kind (such as stocks or shares) which, practically speaking, a trustee cannot personally sell, or which it would be distinctly contrary to the ordinary usage of mankind for him to sell personally, he may employ an agent or broker, so long as he acts as prudently as he would have done for himself in a like case (*i*). For "where an investment of trust moneys May employ agents where morally obliged to do so.

(*d*) *Robson* v. *Flight*, 4 D. J. & S. 608.
(*e*) *Oliver* v. *Court*, 8 Pr. 127; *Hardwick* v. *Mynd*, 1 Anst. 109; *Hawkins* v. *Kemp*, 3 East, 410.
(*f*) *Re Hetling and Merton*, [1893] 3 Ch. 269.
(*g*) *Att.-Gen.* v. *Scott*, 1 Ves. sen. 413.
(*h*) *Stuart* v. *Norton*, 14 Moo. P. C. 17.
(*i*) *Ex parte Belchier*, Amb. 218.

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is proper to be made upon securities which are purchased and sold upon the public exchanges, either in town or country, the employment of a broker, for the purpose of purchasing those securities, and doing all things usually done by a broker which may be necessary for that purpose, is *primâ facie* legitimate and proper. A trustee is not bound himself to undertake the business (for which he may be very ill-qualified) of seeking to obtain them in some other way; as, for example, by public advertisement or by private inquiry" (*k*).

May employ skilled persons.

So trustees may appoint stewards, bailiffs, workmen and other agents of the like kind; for there is a moral necessity for them to do so (*l*). And on the same ground, they may employ solicitors, valuers (*m*), auctioneers, and other skilled persons to do acts which they themselves are not competent to do. They may employ an accountant where their accounts are of a complicated nature, and where the occasion is one in which, according to the usage of business, a prudent man acting for himself would employ such a person (*n*). But of course trustees are not entitled to have their books of account of income and expenditure regularly kept by an accountant, merely in order to save themselves trouble. As Lord HALSBURY said, in *Re Whiteley*, *Whiteley* v. *Learoyd* (*o*), "I think it is quite clear, that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law, and in this case I do not deny that he would be entitled to rely upon a valuer upon a pure question of valuation. But unless one examines with reference to what question the skilled person gives advice, it is possible to confuse the reliance which may be properly placed upon the skill of a skilled person with the judgment which the trustee

(*k*) *Per* SELBORNE, L.C., *Speight* v. *Gaunt*, 9 App. Cas. 1.

(*l*) *Re Whiteley*, *Whiteley* v. *Learoyd*, 12 App. Cas. 727.

(*m*) With regard to valuers, a trustee is now expressly authorised to act on a valuer's report and advice as to the value of property offered as a security for trust funds (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8, see *supra*, p. 235).

(*n*) See *New* v. *Jones*, 1 M. & G. 668 n.; *Henderson* v. *M'Iver*, 3 Madd. 275.

(*o*) 12 App. Cas. 727, at p 731.

himself is bound to form on the subject of the performance of his trust. I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of the particular trustee. Persons who accept that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence." Art. 42.

Lord HALSBURY'S phrase, "he may, *perhaps*, rely upon a lawyer in some matters of law," referred, it is conceived, to the doubt thrown upon that proposition by the decision of the late Lord ROMILLY in *Hopgood* v. *Parkin* (*p*). In this the learned judge carried the liability of trustees for the acts and defaults of their agents to a height which, it is with humility suggested, was by no means justified, either on principle or authority. In this case, trustees, having trust funds to lend on mortgage, employed a solicitor to investigate the mortgagor's title. Owing to the solicitor's negligence in failing to make proper inquiries as to previous incumbrances, the trust moneys advanced on the mortgage were to a large extent lost; and his lordship held that the trustees must replace them. But it is difficult to understand upon what grounds the learned judge based his opinion. The trustees were right in investing on mortgage: they were right in employing a skilled person to investigate the real value of the security; indeed, it is apprehended, from the remarks of the late Sir GEORGE JESSEL, M.R., in *Re Cooper and Allen* (*q*), that it was the *duty* of the trustees to employ a skilled person. In addition to which, there was a moral necessity for them to employ a skilled agent to investigate the title, and they were but acting conformably to the general "usage of mankind, and as prudently for the trust as for themselves, and according to the usage of business" (*r*). If, then, they were right in employing the solicitor to investigate the title for them, upon what possible ground could they be held responsible for their agent's default? As Lord HARDWICKE said, in *Ex parte Belchier* (*s*), Whether liable for negligence of solicitor.

(*p*) 11 Eq. 74.
(*q*) 4 Ch. D. 815.
(*r*) *Per* Lord HARDWICKE, *Ex parte Belchier*, Amb. 218; and to the same effect, Lord SELBORNE in *Speight* v. *Gaunt*, 9 App. Cas. 1.
(*s*) *Supra*.

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if the defendant "is chargeable in this case, no man in his senses would act. . . . This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own"; and his lordship then proceeded to lay down the rule as above stated. It is with great respect submitted, that Lord ROMILLY confused the case with those in which it has been held that a trustee is responsible for a *breach of trust* which he has committed *bonâ fide* and under skilled advice. The distinction, is, however, clear. The trustees had not *done* anything wrong. They had not committed any breach of trust at the instance of another. They had merely lent money through the medium of an agency, which they were entitled, and indeed bound, to employ, on the ground of moral necessity; and they ought therefore to have been discharged from the loss. Had there been a distinct breach of some duty which the settlor had cast upon the trustees, then, although they might have taken and followed the best advice procurable, they would, no doubt, have been properly held responsible. But here, the only possible breach of duty was the *negligence* of an agent; and, as has been said above, a trustee is only responsible for his agent where he has improperly employed one. Moreover, since the above was first written, LINDLEY, L.J., in *Speight* v. *Gaunt* (*t*), has expressly dissented from *Hopgood* v. *Parkin*, and, indeed, it seems to be quite inconsistent with the judgments of the learned Lords of Appeal in that case (*u*).

Whether a trustee rightly employing an agent may trust him with trust money.

Even where a trustee is justified in delegating the sale or purchase of property to other persons (such as brokers, solicitors, and the like), it does not necessarily follow that he is justified in giving them the control of the purchase-money. That question must be regarded as a separate and distinct one, to be solved on its own merits, but by the application of the same principle, viz., whether or not there is a moral necessity or a conformity to common usage.

(*t*) 22 Ch. D., at p. 761; and see *per* PEARSON, J., in *Re Pearson, Oxley* v. *Scarth*, 51 L. T. 692; *Re Weall, Andrews* v. *Weall*, 42 Ch. D. 674.
(*u*) 9 App. Cas. 1.

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Thus, where a trustee handed money to a solicitor for the purpose of re-investment, and the solicitor professed to have invested it, but in reality had used it for his own purposes, and himself paid interest on it for some years until his death, it was held that the trustee was liable (*v*); for he ought not to have entrusted the money to a solicitor when there was no necessity.

Statutory authority to entrust trust bond to solicitor or banker.

On similar grounds, it was formerly held, in *Re Bellamy and Metropolitan Board of Works* (*x*), that trustees were not entitled to authorise their solicitor to receive purchase-money payable to them; notwithstanding s. 56 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). However, by s. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (re-enacting s. 2 of the Trustee Act, 1888), it is enacted as follows:

"(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

"(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

"(3) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been

(*v*) *Bostock* v. *Floyer*, 1 Eq. 26; *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Hanbury* v. *Kirkland*, 3 Sim. 265; *Re Dewar*, *Dewar* v. *Brooke*, 33 W. R. 497. But see *Re Bird*, *Oriental Commercial Bank* v. *Sarin*, 16 Eq. 203, *contra*, a decision which it is conceived, cannot be supported.

(*x*) 24 Ch. D. 387.

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passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

"(4) This section applies only where the money or valuable consideration or property is received after the 24th day of December, one thousand eight hundred and eighty-eight.

"(5) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

Comments on the above section.

The section is not, perhaps, so happily expressed as it might be. For instance, can a trustee authorise his solicitor to receive consideration money, except by permitting him to have the custody of the deed, etc.? And where the receipt is indorsed on a deed, and not contained in the body thereof; can that deed be said to be "a deed *containing* any such receipt as is referred to in s. 56 of the Conveyancing and Law of Property Act, 1881"?

The first of these queries is, it is submitted, by no means hypercritical; and in cases where any money or property is receivable by a trustee on any occasion where the execution of a deed by the trustee is not necessary (as, for example, the payment of a legacy by executors to the trustees of the legatee's marriage settlement), considerable doubt must exist as to whether the payment can be properly made to the trustee's solicitor under this sub-section, even although the solicitor be expressly authorised by the trustee to receive it. This view receives some support from the provisions contained in sub-s. (2), which expressly authorise a trustee to appoint a solicitor his agent to receive policy moneys *by permitting him to have the custody of and to produce the policy with a receipt signed by the trustee.* "Policy money" would certainly fall within the first sub-section as "money receivable by such trustee." If, therefore, under sub-s. (1), the trustee could appoint a solicitor in any other way than that indicated, there would have been no necessity for expressly authorising (by sub-s. (2)) a trustee to appoint

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a solicitor to be his agent to receive and give a discharge for policy moneys; nor for declaring that no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making an appointment of a solicitor for *that* purpose. Anyhow, the point does not appear to be free from doubt.

With regard to the second query, it is probable that the court would consider an indorsed receipt as equivalent to a receipt contained in the deed on which it is indorsed, within the meaning of the sub-section.

It will be perceived that sub-s. (1) does not authorise a trustee to appoint anyone to receive money, valuable consideration, or property, *except a solicitor*. Consequently, the decision in *Re Flower and Metropolitan Board of Works* (*y*), that one of several trustees cannot in general be authorised by his co-trustees to receive and give a good receipt for trust moneys, still holds good. It is apprehended, however, that where one of the trustees is a solicitor, the money may be paid to him on production of a deed containing a receipt; notwithstanding that he may not be acting as the solicitor to the trustees.

Entrusting trust money to stock-broker.

Apart from statutory authority, where there is a moral necessity to entrust the agent with the money, a trustee will be justified in doing so, as was decided by the House of Lords in the important case of *Speight* v. *Gaunt* (*z*). There, the respondent, Isaac Gaunt, being acting trustee under the will of John Speight, a stuff manufacturer at Bradford, wished to invest the sum of £15,275, part of the trust estate, in the securities of municipal corporations in Yorkshire. For that purpose he employed a stockbroker, named Cooke, to buy the stock for him. Cooke having falsely represented that he had purchased the stock, the respondent gave him cheques for the amount, which Cooke embezzled. The beneficiaries then sought to make the trustee liable for the sum embezzled by Cooke. In giving judgment, exonerating the trustee from liability, the Earl of SELBORNE said: "In

(*y*) 27 Ch. D. 592.

(*z*) 9 App. Cas. 1.

Art. 42. the early case of *Ex parte Belchier*, before Lord HARDWICKE (*a*), it was determined, that trustees are not bound personally to transact such business connected with, or arising out of, the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents. Also that when, according to the usual and regular course of such business, moneys, receivable or payable, ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss." His lordship, after discussing the question whether it was proper to employ a broker at all, which he answered in the affirmative, continued: "The next subject of inquiry is, whether it was a just and proper consequence of that employment, according to the principle of *Ex parte Belchier*, that the trust money should pass through his hands. . . . The whole evidence satisfies me that the usual and regular course of business on the London Exchange is, for the money, under such circumstances, to pass through the broker's hands." Their lordships, therefore, exonerated the trustee from responsibility.

May employ a debt collector.

So, again, where there are numerous small debts to be collected, it cannot be expected of executors or trustees that they should personally call on each debtor. Consequently, if, under such circumstances, they employ, in the usual course of business, a debt collector, and the money collected is lost by reason of the collector's insolvency, the trustees are *primâ facie* not responsible (*b*).

Remitting money through banker.

On the ground of conformity to universal usage, trustees may remit money through the medium of a respectable bank, as being the most convenient and the safest mode (*c*);

(*a*) Amb. 218.
(*b*) *Re Brier, Brier* v. *Erison*, 26 Ch. D. 238.
(*c*) *Knight* v. *Earl of Plymouth*, 1 Dick. 120.

but they should pay the money into the bank *as* trustees, and *eo nomine* (*d*). Art. 42.

Custody of securities.

It is obvious that several trustees cannot all have the physical custody of the trust securities. This is of no great importance where they have the legal estate in lands, or where they are holders of registered stocks; and in such cases the court will not order one trustee, who has possession of such securities, to deposit them with bankers in the joint names of all (*e*). But where the securities are "bearer securities," the matter becomes of importance. In such cases they should not leave them either with their solicitor (*f*) or with one of themselves (*g*), but should place them in a box in the custody of their banker (*h*).

Joining with others in a sale.

On the principles enunciated in the article now under consideration, it has been held, that if "trustees for sale join with any other person in a joint sale of the trust property and any other property, whether that person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them; and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, when they do join with other people the purchase-money must be apportioned before the completion of the purchase, and must be paid by the purchaser, the apportioned part coming to the trustees to be paid to them" (*i*), or, now, to their solicitor, under s. 17 of the Trustee Act, 1893 (*k*).

PARAGRAPH (2).

Leaving money in hands of auctioneer.

On similar principles (viz., conformity to ordinary business usage), a trustee may allow an auctioneer who is selling the trust property, to receive the deposit money; but he must

(*d*) *Wren* v. *Kirton*, 11 Ves. 377.
(*e*) *Re Sisson's Trusts*, *Jones* v. *Trappes*, [1903] 1 Ch. 262.
(*f*) *Field* v. *Field*, [1894] 1 Ch. 425.
(*g*) *Candler* v. *Tillett*, 22 Beav. 257; *Lewis* v. *Nobbs*, 8 Ch. D. 591.
(*h*) *Re De Pothonier*, *Dent* v. *De Pothonier*, [1900] 2 Ch. 529.
(*i*) *Per* JESSEL, M.R., *Re Cooper and Allen*, 4 Ch. D, 815.
(*k*) *Supra*, p. 249.

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not allow it to remain in the auctioneer's hands for an unreasonable time (*l*).

Entrusting moneys to a banker.

So, again, a trustee may, and indeed should, deposit trust moneys in a respectable bank pending investment; and he will not be liable for the failure of the bank, unless he left the money there for an unnecessarily long period. For it is according to the common usage of mankind to make use of banks for the safe custody of money (*m*). But a trustee will be liable where he has *unnecessarily* left trust moneys in the hands of a banker who fails, when he ought to have invested them; or where he has paid money to a banker or broker for investment and has neglected for some time to make inquiries as to such investment (*n*); and the *usual* clause indemnifying him against the acts or defaults of others will not protect him (*o*). In one case, KAY, J., held that six months was the maximum time for which trustees should deposit money in a bank; and that if at the expiration of that period no other investment was available, the trustees ought to invest in consols. In the case in question the trustees had kept the money on deposit for fourteen months, and were held responsible for the loss caused by the failure of the bank (*p*).

ART. 43.—*Duty of Trustees to act jointly where more than one.*

Where there are more trustees than one, all must join in the execution of the trust (*q*), save only—

(a) where the settlement or a competent court otherwise directs;

(*l*) *Edmonds* v. *Peake*, 7 Beav. 239; *Wyman* v. *Paterson*, [1900] A. C. 271.

(*m*) *Johnson* v. *Newton*, 11 Hare, 160; *Fenwick* v. *Clarke*, 31 L. J. Ch. 728, and *per* Lord HARDWICKE, *Ex parte Belchier*, Amb. 219.

(*n*) *Challen* v. *Shippam*, 4 Hare, 555; *Rehden* v. *Wesley*, 29 Beav. 213; *Matthews* v. *Brise*, 6 Beav. 239; *Moyle* v. *Moyle*, 2 R. & M. 710.

(*o*) *Rehden* v. *Wesley*, *supra*. (*p*) *Cann* v. *Cann*, 51 L. T. 770.

(*q*) *Lake* v. *South Kensington Hotel Co.*, 11 Ch. D. 121; *Ex parte Griffin*, 2 G. & J. 116; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.

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(b) as to the receipt of income (*r*);

(c) as to such matters as can be lawfully delegated under Art. 42.

This article is a corollary of Art. 42. For, if trustees cannot delegate their duties, it follows that they must all personally perform those duties, and not appoint one of themselves to manage the business of the trust. It is not unusual to find one of several trustees spoken of as the "acting trustee," meaning the trustee who personally interests himself in the trust affairs, and whose decisions are merely indorsed by his co-trustees. The court, however, does not recognise any such delegation; for the settlor has trusted *all* the trustees, and it behoves each and every of them to exercise his individual judgment and discretion on every matter, and not blindly to leave all questions to his co-trustees or co-trustee (*s*).

Cannot act by vote of majority.

Thus, the act of a majority of private trustees cannot bind a dissenting minority, nor the trust estate. In order to bind the trust estate the act must be the act of all (*t*). For instance, where there is a trust to sell real estate with a discretionary power to postpone the sale, the property must be sold within a reasonable time, unless the trustees are unanimously in favour of a postponement (*u*).

Must all join in receipt.

So, all the trustees must join in the receipt of money, unless, of course, the settlement authorises one of them to give good receipts and discharges. For, as KAY, J., said in *Re Flower and Metropolitan Board of Works* (*x*), "The theory of every trust is, that the trustees shall not allow the trust

(*r*) As to shares and stocks, see Companies Act, 1862 (25 & 26 Vict. c. 89), Clause 1 of Table A., and same Act, s. 30; but consider *Binney* v. *Ince Hall, etc., Co.*, 35 L. J. Ch. 363. As to rents, see *Townley* v. *Sherborne*, Bridg. 35; *Gouldsworth* v. *Knight*, 11 M. & W. 337; and *Gough* v. *Smith*, W. N. (1872), p. 18.

(*s*) *Munch* v. *Cockerell*, 5 My. & C. 179.

(*t*) *Luke* v. *South Kensington Hotel Co.*, *supra*. It is otherwise, however, with regard to charitable trustees: see Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 13. There is also an exception in the case of trustees of a manor with regard to enfranchisement, as to which, see Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 40.

(*u*) *Re Roth, Goldberger* v. *Roth*, 74 L. T. 50.

(*x*) 27 Ch. D. 592.

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moneys to get into the hands of any one of them, but that all shall exercise control over them. They must take care that they are in the hands of all, or invested in their names, or placed in a proper bank in their joint name. The reason why more than one trustee is appointed, is, that they shall take care that the moneys shall not get into the hands of one of them alone; and they have no right, as between themselves and the *cestuis que* trusts, (unless the circumstances are such as to make it imperatively necessary to do so,) to authorise one of themselves to receive the moneys" (*y*).

Investments should be in joint names.

All investments of trust moneys should be made in the joint names of the trustees, for otherwise one trustee would be able to realise and appropriate the money (*z*). But this must of course yield to necessity; as, for instance, where shares were specifically bequeathed to trustees upon certain trusts, and it was found that by the regulations of the company the shares could only be registered in the name of one trustee (*a*).

Income.

As a general rule, however, although trustees must join in the receipt of capital, it is permissible for them to allow one of their number to receive the income. Thus, in the case of rents, the trustees may delegate the collection to one of their number or to a rent collector. For it would be impossible for them all to collect the rents (*b*). But if there is any fear of misappropriation by the collecting trustee, the others should notify the tenants not to pay him again (*c*). A similar rule applies to the receipt of dividends on stocks or shares, from the necessity of the case; because the companies are not bound to recognise trusts, and always pay to the first of several joint holders (*d*).

(*y*) See also *Lee* v. *Sankey*, 15 Eq. 204; *Clough* v. *Bond*, 3 My. & C. 490; and *Walker* v. *Symonds*, 3 Sw. 1, at p. 61.

(*z*) *Lewis* v. *Nobbs*, 8 Ch. D. 591; *Swale* v. *Swale*, 22 Beav. 584.

(*a*) *Consterdine* v. *Consterdine*, 31 Beav. 330.

(*b*) *Townley* v. *Sherborne*, 2 W. & T. L. C. 629.

(*c*) *Gough* v. *Smith*, W. N. (1872) p. 18.

(*d*) See s. 30, Companies Act, 1862 (25 & 26 Vict. c. 89), and the Acts or charters of all the great companies. But the court may interfere in case of necessity (*Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29; *Binney* v. *Ince Hall, etc., Co.*, 35 L. J. Ch. 363). As to cases in which the court will order dividends to be paid to one of several trustees, *cf. Re Pryor*, 35 L. T. 202; and *Re Carr, Carr* v. *Carr*, 36 W. R. 688.

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Trustee joining in receipt for conformity.

In cases where, from necessity, a trustee permits his co-trustee to receive moneys owing to the estate (*e.g.*, where he permits him to collect rents), then, even though he join in the receipt for such moneys, and thereby acknowledge that he has received them, he will not be liable *if he can prove* (*e*) that he did not in fact receive them, that he only joined in the receipt for the sake of conformity (*f*), and that the delegation of the right to receive was necessary (*g*). For one of several trustees cannot alone give a good receipt so as to discharge the payer, unless expressly empowered to do so by the settlement; and all must, therefore, join (*h*). Consequently, although the receipt is an admission that the money came to his hands, "equity, which pursues truth, will decree according to the justice and verity of the fact" (*i*), and will hold that, under the circumstances (seeing that it is an act which the very nature of his office will not permit him to decline (*k*)), it does not amount to conclusive evidence that he actually received the money.

Must not permit co-trustee to retain trust money.

Even where a trustee may safely permit his co-trustee to receive trust moneys, he will, nevertheless, be liable if he permit him to retain them for a longer period than the circumstances of the case necessitate (*l*).

Must not permit co-trustee to sign cheques.

For like reasons, trustees in whose names trust moneys are banked, should not authorise the bankers to pay cheques signed by one only of their number; for that would be

(*e*) *Brice* v. *Stokes*, 2 Wh. & Tu. 633; *Townley* v. *Sherborne*, 2 *ib.*, 629; *Re Fryer*, 3 K. & J. 317.

(*f*) *Fellows* v. *Mitchell*, 1 P. Wms. 81; *Re Fryer*, *supra*.

(*g*) *Brice* v. *Stokes*, *supra*: *Shipbrook* v. *Lord Hinchinbrook*, 16 Ves. 477.

(*h*) Lew. 233. See *Ex parte Belchier*, Amb. 218; *Walker* v. *Symonds*, 3 Sw. 1; *Lee* v. *Sankey*, 15 Eq. 204; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.

(*i*) See *per* Lord HENLEY, *Harden* v. *Parsons*, 1 Eden, 147.

(*k*) Lew. 233. As to executors' receipts, see *Wesley* v. *Clarke*, 1 Eden, 357; *Joy* v. *Campbell*, 1 Sch. & L. 341; *Langford* v. *Gascoyne*, 11 Ves. 333; and *Shipbrook* v. *Lord Hinchinbrook*, *supra*.

(*l*) *Brice* v. *Stokes*, *supra*; *Thompson* v. *Finch*, 8 De G. M. & G. 569; *Walker* v. *Symonds*, 3 Sw. 1; *Hanbury* v. *Kirkland*, 3 Sim. 265; *Styles* v. *Guy*, 1 Mac. & G. 422; *Egbert* v. *Butler*, 21 Beav. 560; *Rodbard* v. *Cooke*, 25 W. R. 555; *Learis* v. *Nobbs*, 8 Ch. D. 591; *Consterdine* v. *Consterdine*, 31 Beav. 330; and *Carruthers* v. *Carruthers*, [1896] A. C. 659.

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equivalent to giving the sole control of the trust funds to one trustee; whereas the beneficiaries are entitled to the safeguard of the trustees' joint control (*m*). A trustee may, however, entrust his co-trustee with a crossed cheque, signed by both of them, for delivery to the beneficiary (*n*).

May allow title deeds to remain in custody of co-trustee.

On the ground of necessity, trustees may allow the custody of title deeds to remain with one of their number; for any other rule would be productive of the greatest inconvenience (*o*). But it seems that the rule is different with regard to bonds payable to bearer (*p*).

Must be joint mortgagees.

Apart from other reasons, the trust money cannot be advanced to one of the trustees on mortgage, however good the security may seem. For he cannot act both as mortgagor and mortgagee; and without his joinder in the latter capacity, his co-trustees cannot legally act (*q*). It is apprehended that the same incapacity attaches where he is mortgagor as trustee of another settlement, and not merely on his own account.

ART 44.—*Duty of Trustee not to set up Jus tertii.*

A trustee, who has acknowledged himself as such, must not set up, or aid, the adverse title of a third party against his beneficiary (*r*). But (*semble*) he has a right to have the direction of the court as to whether he should resist it (*s*).

Chapel trustees joining seceders.

In *Newsome* v. *Flowers*, *supra*, a chapel was vested in trustees, in trust for Particular Baptists. Subsequently a

(*m*) *Clough* v. *Bond*, 3 My. & C. 490; *Trutch* v. *Lamprell*, 20 Beav. 116.

(*n*) *Barnard* v. *Bagshawe*, 3 De G. J. & S. 355.

(*o*) *Per* WOOD, V.-C., *Cottam* v. *Eastern Counties Rail. Co.*, 1 J. & H. 243; *Re Sisson's Trusts*, *Jones* v. *Trappes*, [1903] 1 Ch. 262.

(*p*) *Lewis* v. *Nobbs*, 8 Ch. D. 591.

(*q*) *Stickney* v. *Sewell*, 1 My. & C. 8; *Francis* v. *Francis*, 5 De G. M. & G. 108; *Fletcher* v. *Green*, 33 Beav. 426.

(*r*) *Newsome* v. *Flowers*, 30 Beav. 461.

(*s*) *Neale* v. *Davies*, 5 De G. M. & G. 258: *per* WOOD, V.-C., and TURNER, L.J. (KNIGHT-BRUCE, L.J., *dissentiente*).

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schism took place, and part of the congregation seceded, and went to another chapel. Still later, the surviving trustees were induced (not knowing the real object) to appoint new trustees, and vest the property in them. Immediately afterwards, the new trustees—who were in fact attached to the seceding congregation—brought an action to obtain possession of the chapel. Their appointment was, however, set aside, and it was held that they could not raise the adverse claims of the seceders as a defence against the congregation of the chapel, who were their beneficiaries.

Must not contest the title of their beneficiaries.

Nor, however honestly trustees may believe that the trust property belongs of right to a third party, are they justified in refusing to perform the trust they have once undertaken, or in communicating with such other person on the subject; but they must assume the validity of the title of their beneficiaries until it be negatived (*t*).

They may appeal to court to relieve them of the trust.

Where, however, trustees have received notice of a paramount claim, and of the intention of the notifying party to hold them responsible if they deal with the fund in a manner contrary to such paramount claim, it is not yet authoritatively settled whether, in face of such notice, the trustees are bound to go on steadily executing the trust which they have undertaken, or whether they can apply to the court for relief. In *Neale* v. *Davies* (*u*), it was held by Wood, V.-C., and Turner, L.J. (Knight-Bruce, L.J., *dissentiente*), that the trustees were entitled to refuse to execute the trust under such circumstances, and had a right to come to the court for its direction. Knight-Bruce, L.J., however, energetically dissented, saying: "I am of opinion that it is not competent in law, equity, or honesty, for men so to act. I am of opinion that if, by paying the fund to their *cestuis que* trusts they would make themselves personally liable to the adverse claimant in the event of his being successful, they were and are bound to perform the

(*t*) *Beddoes* v. *Pugh*, 26 Beav. 407.
(*u*) 5 De G. M. & G. 258.

Art. 44. trust which they undertook" (*x*). The doctrine as enunciated in the rule, however, is, it is apprehended, correct. It is certainly in accordance with modern practice, and is probably justified by Order LV., r. 3 (g), of the Rules of the Supreme Court.

ART. 45.—*Duty of Trustee to act gratuitously.*

A trustee has no right to charge for his time and trouble (*z*) except—

(a) where the settlement provides for it (*a*);

(b) where he has, at the time of accepting the trust, expressly stipulated for remuneration (*b*), and the beneficiaries being *sui juris* have freely and without unfair pressure assented to such stipulation (*c*);

(c) where the trust is before the court, and the trustee has, before accepting the trust, expressly stipulated for remuneration (*d*);

(d) where one who is not an express trustee has properly traded with another's money under circumstances which make him a constructive trustee of the profits (*e*);

(*x*) *Neale* v. *Davies*, *supra*; see also *Neligan* v. *Roche*, Ir. Reps. 7 Eq. 332; *Hurst* v. *Hurst*, 9 Ch. App. 762; and as to agents, *Nickolson* v. *Knowles*, 5 Madd. 47.

(*z*) *Robinson* v. *Pett*, 2 Wh. & Tu. 606. By a recent Act of the Canadian Parliament, trustees in the Dominion are authorised to retain a commission.

(*a*) *Robinson* v. *Pett*, *supra*; *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Willis* v. *Kibble*, 1 Beav. 559.

(*b*) *Re Sherwood*, 3 Beav. 338; *Douglas* v. *Archbutt*, 2 De G. & J. 148.

(*c*) *Aylife* v. *Murray*, 2 Atk. 58.

(*d*) *Barrett* v. *Hartley*, 12 Jur. (N.S.) 426; *Moore* v. *Frowd*, 3 My. & C. 45.

(*e*) *Brown* v. *Litton*, 1 P. Wms. 140.

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(e) where the trust property is abroad, and it is the custom of the local courts to allow remuneration (*f*).

Solicitor-trustee must not generally charge.

Thus, a trustee who is a solicitor will not be allowed to charge for his time and trouble, nor for his professional attendance; for, as was somewhat dryly said by Lord LYNDHURST, in *New* v. *Jones* (*g*), "A trustee placed in the position of a solicitor might, if allowed to perform the duties of a solicitor, and to be paid for them, find it very often proper to institute and carry on legal proceedings which he would not do if he were to derive no emolument from them himself, and if he were to employ another person." The incapacity not only applies to the solicitor-trustee personally, but also to his firm, who cannot, by acting as *his* solicitors, charge profit costs, either in an action, or for preparing leases and the like on behalf of the trust estate (*h*).

Aliter if authorised by the settlement.

But if the settlement provides that the trustee *may* charge, he will be allowed to do so; but his charges will be strictly limited to those indicated by the settlor. Thus, if a solicitor-trustee is authorised to make "professional charges," he will not be allowed to charge for time and trouble expended other than in his position as solicitor (*i*). But, on the other hand, where a will authorises any trustee thereof who may be a solicitor to make "the usual professional, *or other proper and reasonable charges*, for all business done and time expended in relation to the trusts of the will, *whether such business is usually within the business of a solicitor or not*," the taxing master has power to allow to a solicitor-trustee, the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate (*k*), although not for work

(*f*) *Chambers* v. *Goldwin*, 9 Ves. 254.
(*g*) 1 Mac. & G. 668 n.
(*h*) *Re Corsellis*, *Lawton* v. *Elwes*, 34 Ch. D. 675.
(*i*) *Harbin* v. *Darby*, 28 Beav. 325; *Re Chapple*, *Newton* v. *Chapple*, 27 Ch. D. 584.
(*k*) *Re Ames*, *Ames* v. *Taylor*, 25 Ch. D. 72. Where the trust is created by will, the solicitor's charges in such cases are considered to be legacies for purposes of legacy duty (*Re Thorley*, *Thorley* v. *Massam*, [1891] 2 Ch. 613). By similar reasoning he loses the right if he attests

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altogether outside his professional avocations (*l*). And this holds good even where a legacy is given to the solicitor-trustee conditionally upon his accepting the trust (*m*). However, in all such cases the trustees cannot, in the absence of special powers, settle the amount payable to the solicitor-trustee so as to bind the beneficiaries, and the latter are consequently entitled to have the solicitor's costs investigated (*m*); and it is the duty of the solicitor-trustee to inform them of their right to tax his bill (*n*).

Rule applicable even where third party pays the costs.

Where a solicitor-trustee is acting *for the trust estate*, he will not be allowed to make profit costs merely on the ground that a third party (*e.g.*, a lessee or mortgagor) has to repay the costs to the trust estate (*o*).

Exception where solicitor acts for self and another.

There is a curious exception to the rule that a solicitor-trustee cannot, in the absence of an enabling clause, charge profit costs. This exception (known as the rule in *Cradock* v. *Piper* (*p*)), has been enunciated in the following terms: "Where there is work done *in court*, not on behalf of the trustee who is a solicitor alone, but on behalf of himself and a co-trustee, the ordinary principle will not prevent the solicitor, or his firm, from receiving the usual costs, if the costs of appearing for, or acting for, the two, have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee" (*q*). This exception is, however, limited to the costs incurred in respect of business done in an *action or matter*, and does not apply to business done out of court (*q*).

Cannot generally claim a salary.

In general, a trustee, whether express or constructive, will not be permitted to claim a salary or any remuneration

the will (*Re Pooley*, 40 Ch. D. 1); and he cannot charge at all if the estate is insolvent (*Re White, Pennell* v. *Franklin*, [1898] 2 Ch. 217). But whether these cases can be supported on principle is respectfully questioned.

(*l*) *Clarkson* v. *Robinson*, [1900] 2 Ch. 722.

(*m*) *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413; and *cf. Re Wellborne*, [1901] 1 Ch. 312.

(*n*) *Re Webb, Lambert* v. *Still*, [1894] 1 Ch. 73.

(*o*) *Re Corsellis, Lawton* v. *Elwes*, *supra*; but see and distinguish last paragraph, p. 266, *infra*.

(*p*) 1 Mac. & G. 664.

(*q*) *Per* COTTON, L.J., in *Re Corsellis, Lawton* v. *Elwes*, 34 Ch. D. 675.

for managing a trade or business (*r*). Thus, in *Barrett* v. *Hartley* (*s*), where a trustee had carried on a business for six years, in consequence whereof great advantage had accrued to his beneficiaries, it was held that he had no right to exact or charge any remuneration or bonus in respect of such services; for his exertions were incident to the performance of the duties imposed by the deed of trust which he had accepted. Art. 45.

There is authority for saying that this does not apply to one who *rightfully* becomes possessed of another's money and rightfully trades with it; and that he will be entitled to a reasonable remuneration, although he is of course a constructive trustee of the profits of the trade (*t*). For instance, in *Brown* v. *Litton* (*u*), the plaintiff's testator was the captain of a ship, who, being on a voyage, had 800 dollars which he intended to invest in trade. The captain died, and the defendant, who was the mate of the ship, becoming captain in his place, took possession of these 800 dollars, and by judiciously trading with them made considerable profits. Upon a bill being filed against him for an account, the Lord Keeper Harcourt ordered that the master should settle a proper salary for the pains and trouble he had been at. Exception

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Art. 46.—*Duty of Trustee not to traffic with or otherwise profit by Trust Property.*

(1) A trustee must not use or deal with trust property for his own private advantage (*x*).

(*r*) *Stocken* v. *Dawson*, 6 Beav. 371; *Burden* v. *Burden*, 1 V. & B. 170. In the United States of America this rule is exactly reversed.

(*s*) L. R. 2 Eq. 789. For a case in which, on the appointment of a new trustee by the court, he was authorised to retain a commission, see *Re Freeman's Settlement*, 37 Ch. D. 148.

(*t*) *Brown* v. *De Tastet*, Jac. 284; *Wedderburn* v. *Wedderburn*, 22 Beav. 84.

(*u*) 1 P. Wms. 140. Probably decided on the principle that he who seeks equity must do equity.

(*x*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Ex parte Lacey*, 6 Ves. 625; and see *Re Imperial Land Co. of Marseilles*, 4 Ch. D. 566; *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544; and *Rochefoucauld* v. *Boustead*, [1898] 1 Ch. 550.

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(2) A trustee is absolutely incapacitated while he remains a trustee from purchasing, leasing, or accepting a mortgage of trust property either from himself (*y*) or his colleagues (*z*), however fair the transaction may be (*a*), unless:

(a) under an express power in the settlement; or

(b) by leave of a competent court (*b*).

(3) A trustee may, however, purchase, or lease, or accept a mortgage of trust property direct from beneficiaries (*c*); but in that case, if the transaction be impeached, it is incumbent on the trustee to prove (*d*) affirmatively and conclusively:

(a) that he and the beneficiaries were at arm's length, and that no confidence was reposed in him;

(b) that the transaction was for the advantage of the beneficiaries; and

(c) that full information was given to the beneficiaries of the value of the property, of the nature of their interest therein, and of the circumstances of the transaction (*e*).

(*y*) *Fox* v. *Mackreth*, 2 Wh. & Tu. 709.

(*z*) *Ib.*; and *Whichcote* v. *Lawrence*, 3 Ves. 740, and *Morse* v. *Royal*, 12 *ib.* 374.

(*a*) *Ex parte Lacey*, *supra*; *Ex parte Bennett*, 10 Ves. 381; *Gibson* v. *Jeyes*, 6 Ves. 266.

(*b*) *Farmer* v. *Dean*, 32 Beav. 327; and see *Tennant* v. *Trenchard*, 4 Ch. App. 537.

(*c*) *Gibson* v. *Jeyes*, *supra*; *Morse* v. *Royal*, *supra*; *Ex parte Lacey*, *supra*.

(*d*) Cases in note (*c*); and also *Randall* v. *Errington*, 10 Ves. 423; *Coles* v. *Trecothick*, 9 *ib.* 234.

(*e*) See *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(4) A trustee cannot qualify himself to become a purchaser by retiring from a trusteeship with that view (*f*). Art. 46.

PARAGRAPH (1).

Thus, a trustee must not actively import trust moneys into his trade or business, or use them in speculations of his own. If he does so (as has been said before) he will be a constructive trustee of the profits; and if there be no profits he will be liable for the breach of trust, and will have to pay compound interest at five per cent., as will be seen hereafter (*g*). Where, however, there has been no *active* breach of trust, but only an omission on the part of a trustee, in whose business the settlor had money invested, to settle up the accounts and properly invest the balance, such an omission will not make him liable to account for the profits (*h*). Must not trade with trust fund.

On similar principles, a trustee of leaseholds cannot use his position for the purpose of getting a new lease granted to himself on the expiration of the term of which he is trustee (*i*). And this principle has been carried so far, that where a trustee of a lease endeavoured fairly and honestly to treat for a renewal on account of the beneficiaries, but was met by a positive refusal by the lessor to grant a renewal for their benefit, and then took the lease for himself, it was held that even in such a case it was incumbent on him to hold the renewed lease for the benefit of the beneficiaries (*k*). Must not get lease renewed to himself.

Where the solicitors in an administration action presented their client, the trustee, with half their profit costs, NORTH, J. (while holding that in the administration Commission paid to trustee by persons

(*f*) *Ex parte James*, 8 Ves. 337; *Spring* v. *Pride*, 4 De G. J. & S. 395. But *cf. Re Boles and the British Land Co.'s Contract*, [1902] 1 Ch. 244.

(*g*) *Infra*, Art. 70.

(*h*) *Vyse* v. *Foster*, L. R. 7 H. L. 318.

(*i*) *Sandford* v. *Keech*, Sel. Ch. Ca. 61: *Bennett* v. *Gaslight and Coke Co.*, 52 L. J. Ch. 98; *Re Lord Ranelagh's Will*, 26 Ch. D. 590; and *Brinton* v. *Ludham*, 53 L. T. 9.

(*k*) *Per* Lord ELDON, in *Ex parte James*, 8 Ves. 337, at p. 345. The case of *Longton* v. *Wilsby*, 76 L. T. 770, must, it is conceived, be restricted to renewals by tenants for life, even if it be good law, as to which see pp. 135, 136, *supra*.

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employed in the trust business.

action he had no jurisdiction in the matter) intimated that if a separate action were brought against the trustee by the beneficiaries to make him hand over the sum so received, he would have no defence (*l*). Of course, a bribe paid to the trustee to induce him to lease or sell the trust property, altogether invalidates the transaction (*m*).

Accretion to trustee's estate belongs to trust.

Where trust moneys were lent on mortgage, and the mortgagor being a person of eccentric character, devised the equity of redemption to "the mortgagee," it was held that, although the mortgagor did not know that the mortgagee was a trustee, yet, as the devise was made to him as mortgagee, and as it was the trust which caused him to occupy that position, the devise of the equity of redemption belonged to the trust, and not to the trustee beneficially (*n*).

Must not sport over trust estate.

Lord ELDON once directed an inquiry whether the right of sporting over the trust property could be let for the benefit of the beneficiaries, and, if not, he thought that the game should belong to the heir of the settlor. The trustee might appoint a gamekeeper, if necessary, for the preservation of the game, but must not keep an establishment of mere pleasure for his own enjoyment (*o*).

Rule does not apply to indirect gains.

The rule does not, however, apply where a trustee remotely, and only incidentally, profits by his connection with the trust; as for instance, where a trustee who is a solicitor lends trust moneys on mortgage to one of his own clients, and thereby obtains a fee *from the latter* for preparing the security (*p*). Nevertheless, it has been held that an advance made by a trustee to one of his beneficiaries under a power of advancement, made *in order to enable* that beneficiary to repay a debt due from him to the trustee,

(*l*) *Re Thorpe*, *Vipont* v. *Radcliffe*, [1891] 2 Ch. 360; and see *Re Smith*, *Smith* v. *Thompson*, [1896] 1 Ch. 71. For further examples of profits made by fiduciary persons the reader is referred to pp. 80 *et seq.*, and pp. 134 *et seq.*, *supra*.

(*m*) *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*n*) *Re Payne's Settlement*, *Kibble* v. *Payne*, 54 L. T. 840. But see *Re Bagnall*, [1901] 1 I. R. 255.

(*o*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480.

(*p*) *Whitney* v. *Smith*, 4 Ch. App. 513; and see also *Butler* v. *Butler*, 7 Ch. D. 116. But *cf. Re Corsellis*, *Lawton* v. *Elves*, 34 Ch. D. 675.

was a breach of trust (*q*). But where there is no such stipulation it would be otherwise (*r*).

Rule inapplicable where trustee is the beneficiary subject to specific charge.

The rule does not apply where the trustee is also the ultimate beneficiary subject to setting aside a specific sum for another. For although in form a trustee, he is substantially beneficial owner, subject to an equitable mortgage for securing the specific sum in question (*s*).

PARAGRAPH (2).

Purchases of trust property by trustees.

Perhaps the most important branch of the subject is that relating to the purchase or lease by trustees of the trust property. With regard to such purchases from *themselves* (as distinguished from purchases from their beneficiaries), the doctrine stands much more upon general principle than upon the circumstances of any individual case. It rests upon this: that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, because no court is equal to the examination and ascertainment of the truth (*t*). Consequently, under no circumstances can an active trustee, nor, indeed, a passive trustee *who has been* (at all events within a recent period) *an active one*, nor even a person who has been erroneously treated by all parties as a trustee (*u*) (*i.e.*, a trustee *de son tort*), purchase trust property from himself or his colleagues, either directly, or collusively through the intervention of a third party (*x*). Such a transaction is voidable at the instance of a beneficiary *ex debito justitiæ*, and without proof of any injury or loss, and the purchaser will also have to repay the rents but without

(*q*) *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648.
(*r*) *Butler* v. *Butler*, *supra*.
(*s*) *Re Campbell*, *Campbell* v. *Campbell*, [1893] 3 Ch. 468.
(*t*) *Per* Lord ELDON in *Ex parte James*, 8 Ves. 337, at p. 345; and see *Beningfield* v. *Baxter*, 12 App. Cas. 167.
(*u*) *Plowright* v. *Lambert*, 52 L. T. 646. As to executor, see *Hall* v. *Hallett*, 1 Cox, 134.
(*x*) *Campbell* v. *Walker*, 5 Ves. 678; *Knight* v. *Majoribanks*, 2 Mac. & G. 10. But in a recent case it was held that a trustee who had retired for upwards of twelve years was not precluded from purchasing part of the trust property (*Re Boles and the British Land Co.'s Contract*, [1902] 1 Ch. 244).

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interest (*y*), a fact which ought to be borne in mind by every trustee. Such a sale also affects all subsequent purchasers with notice, from the trustee (*z*); and therefore, even if a trustee cares to risk such a purchase as between himself and the beneficiaries, he should remember that it practically precludes him from ever parting with the property to a subsequent purchaser. However, this rule does not prevent a trustee selling to a joint stock company in which he is a mere shareholder (as distinguished from a "one man company" (*a*)); for a sale by a person to a corporation of which he is a member is not, either in form or substance, a sale by him to himself and others. Nevertheless, in such a case, there is such a conflict of interest and duty, that if the sale be impeached by the beneficiaries, the *onus* will lie on the company to show affirmatively that the trustee had taken all reasonable pains to secure a purchaser at the best price, and that the price given by the company was not inadequate at the time, although a better price might have been obtained by waiting (*b*).

Subsequent repurchase by trustee without collusion.

However, the fact that a trustee has sold trust property in the hope, subsequently realised, of being able to repurchase it for himself at a future time, is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate at the time, and there was no agreement or understanding existing at the time of the first sale that the purchaser should sell or reconvey the property to the trustee. The fact that the trustee many years afterwards made a handsome profit by the property makes no difference (*c*). However, in the case just cited, over twenty years had elapsed without the sale being impeached, and many of the parties were dead; and, as the court said, the presumption of law that a transaction was legal and honest is a presumption that is strengthened by lapse of time. In a recent case it has been held that a trustee cannot adopt

(*y*) *Silkstone, etc. Co.* v. *Edey*, [1900] 1 Ch. 167.
(*z*) *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544; *Cookson* v. *Lee*, 23 L. J. Ch. 473.
(*a*) *Silkstone, etc. Co.* v. *Edey*, [1900] 1 Ch. 167.
(*b*) *Farrar* v. *Farrars, Limited*, 40 Ch. D. 395.
(*c*) *Re Postlethwaite, Postlethwaite* v. *Rickman*, 37 W. R. 200; and see also *Dover* v. *Buck*, 5 Giff. 57; and *Baker* v. *Peck*, 9 W. R. 472.

for his own benefit an executory contract to purchase from himself as trustee (*d*). Art. 46.

An agent employed for the sale of an estate cannot purchase it for himself or another (*e*), for he is a constructive trustee (*f*). Same rule applies to agents.

So trustees cannot lease or mortgage the trust estate to one of themselves, and if they do so the lessee will have to account for the profits (*g*). Cannot lease or mortgage to himself.

But where there are infant beneficiaries or beneficiaries not *in esse*, the court will, on the application of the trustee, allow him to purchase, if it can see that, *under* the circumstances, it is clearly for the benefit of the beneficiaries, but not otherwise (*h*). The best course of procedure in such an application is to issue a summons under R. S. C. 1883, Order LV., r. 3, asking for an inquiry whether it is for the benefit of the infant beneficiaries that the trustee should be permitted to purchase for a certain sum. If the master certifies that it is, the order will be made as a matter of course. In one case in which the present writer was counsel (*i*), PEARSON, J., ordered the costs of the action to be paid out of the trust estate, on the ground that it was for the infant's benefit, the trustee offering more than the market price; and it is conceived that the course followed by his lordship was correct. Purchase by trustee by leave of the court.

The rule as to selling to himself only applies where the express or constructive trustee is substantially an active trustee. Where he is the mere depository of the legal estate without any duties, and without ever having had any, he may be a purchaser; for instance, where he is a trustee to preserve contingent remainders (*k*), or a person nominated Rule inapplicable to bare trustees.

(*d*) *Williams* v. *Scott*, [1900] A. C. 499.
(*e*) *Ex parte Bennett*, 10 Ves. 381.
(*f*) *Be Bloye's Trust*, 1 Mac. & G. 488; *De Bussche* v. *Alt*, 8 Ch. D. 286.
(*g*) *Ex parte Hughes*, 6 Ves. 617; *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Francis* v. *Francis*, 5 De G. M. & G. 108.
(*h*) *Farmer* v. *Dean*, 32 Beav. 327; *Campbell* v. *Walker*, 5 Ves. 678.
(*i*) *Nunneley* v. *Nunneley*, April 18th, 1883.
(*k*) *Sutton* v. *Jones*, 15 Ves. 584; *Pooley* v. *Quilter*, 4 Drew. 184.

Art. 46. trustee who has disclaimed (*l*). But one who was originally an executive trustee, and has become a mere bare trustee by performance of the trusts, would, it is apprehended, be disqualified; for he would have had an opportunity of becoming acquainted with the property and its value (*m*).

PARAGRAPH (3).

May purchase from beneficiary.

But although a trustee is incapable of purchasing from himself or his colleagues, there is no fixed and arbitrary rule that he cannot, under any circumstances, purchase the interests of his beneficiaries from the beneficiaries themselves. Thus, a sale by the beneficiaries to a trustee was upheld where a beneficiary took the whole management of a sale upon himself, and then agreed to sell a lot, which he had bought in, to one of the trustees (*n*). Yet the court regards such transactions with great jealousy; and, if impeached, they cannot stand unless the trustee can affirmatively and clearly show that the parties were completely at arm's length in making the bargain, that the bargain was a beneficial one to the *cestuis que* trusts, and that the trustee candidly disclosed all facts known to him which could in any way influence the vendors (*o*).

Whether trustee of share of proceeds can purchase.

A question sometimes arises in practice, whether, on a sale by trustees, the property can be purchased beneficially, by a person who is a trustee of a subsidiary settlement by which a share in the proceeds of the sale is settled. Curiously enough, this point seems never to have been decided; but it is submitted that such a purchase might be impeached. For it is the duty of the subsidiary trustee to watch over the interests of *his* beneficiaries. It is obviously to their interest that the sale shall realise a high price, whereas it is the interest of a purchaser that it shall be sold

(*l*) *Stacey* v. *Elph*, 1 M. & K. 195.
(*m*) *Ex parte Bennett*, 10 Ves. 381. But *cf. Re Boles and the British Land Co.'s Contract*, [1902] 1 Ch. 244.
(*n*) *Coles* v. *Trecothick*, 9 Ves. 234; and *Clark* v. *Swaile*, 2 Eden, 134.
(*o*) *Williams* v. *Scott*, [1900] A. C. 499; *Dougan* v. *Macpherson*, [1902] A. C. 197.

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cheap. By becoming a purchaser, therefore, the subsidiary trustee is acting in a character wholly inconsistent with his fiduciary duty; and little doubt is entertained that, if the sale were impeached by his *cestuis que* trusts, the *onus* would be cast on him of proving that he acted *bonâ fide*, and gave an adequate price.

Trustee of trustee's settlement not debarred from purchasing.

Although a trustee cannot purchase from himself, it has been held that the rule does not preclude the trustees of his marriage settlement from purchasing the property (*p*).

Mortgage by beneficiary to trustee.

A trustee may take a fair mortgage from his beneficiary; and, in that case, may rely on his possession of the legal estate, as giving him priority over prior mortgagees of whose claims he had no notice when he made the advance (*q*).

Purchase by solicitor from client.

So, where a client was very desirous of selling property, and, after vainly endeavouring to do so, finally sold it to his solicitor (who was, of course, a constructive trustee), and it was proved that the transaction was fair and the price adequate, and indeed more than could have been obtained elsewhere at the time, and the client quite understood his position, it was held that such a sale was good and binding, although it lay upon the solicitor to prove that it was unimpeachable (*r*). A solicitor purchasing from his client should, however, always make him employ a separate solicitor (*s*). The rule equally applies where the solicitor purchases, not directly from the client, but from the latter's trustee in bankruptcy (*t*).

Purchase by person occupying a position of confidence towards vendor.

The rule applies even where the party from whom advice is sought is not a professional adviser; for the fact that he accepts the position of adviser places him in a fiduciary position towards the party seeking advice (*u*).

(*p*) *Hickley* v. *Hickley*, 2 Ch. D. 190.
(*q*) *Newman* v. *Newman*, 28 Ch. D. 674.
(*r*) *Spencer* v. *Topham*, 22 Beav. 573; 2 Jur. (N.S.) 865; *Gibson* v. *Jeyes*, 6 Ves. 266; *Johnson* v. *Fesemayer*, 3 De G. & J. 13; *Edwards* v. *Meyrick*, 2 Hare, 60.
(*s*) *Cockburn* v. *Edwards*, 18 Ch. D. 449.
(*t*) *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500; and see also *Barron* v. *Willis*, [1900] 2 Ch. 121.
(*u*) *Tate* v. *Williamson*, 2 Ch. App. 55.

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The rule does not apply to certain constructive trustees.

The rule as to the extreme fairness to be observed by trustees in purchasing from beneficiaries does not apply to persons who are only constructive trustees by virtue of some business contract entered into with the so-called beneficiaries. Thus mortgagees can purchase from their mortgagors (*x*), partners from the representatives of a deceased partner (*y*), and other persons bearing analagous relations enjoy a similar freedom; for though contracting parties may by a metaphor be said to be trustees for each other, the trust is strictly limited by the contract. They are trustees only to the extent of their obligation to perform that contract, and the trust is limited to the discharge of that obligation (*z*).

ART. 47.—*Duty of Trustee to be ready with his Accounts.*

(1) A trustee must—

(a) keep clear and accurate accounts of the trust property (*a*); and

(b) at all reasonable times, at the request of a beneficiary, give him full and accurate information as to the amount and state of the trust property (*b*), and permit him or his solicitor (*c*) to inspect the accounts and vouchers, and other documents relating to the trust (*d*).

(2) A trustee is, nevertheless, not bound to supply copies of accounts or trust documents (*e*),

(*x*) *Knight* v. *Majoribanks*, 2 Mac. & G. 10.

(*y*) *Chambers* v. *Howell*, 11 Beav. 6.

(*z*) See *per* WESTBURY, L.C., in *Knox* v. *Gye*, L. R. 5 H. L. 656; but see *per* JESSEL, M.R., *Egmont (Earl)* v. *Smith*, 6 Ch. D. 469; and *Beljemann* v. *Beljemann*, [1895] 2 Ch. 474.

(*a*) *Springett* v. *Dashwood*, 2 Giff. 521; *Burrows* v. *Walls*, 5 De G. M. & G. 233; *Norton* v. *Askew*, 11 Beav. 145, 152; *Pearse* v. *Green*, 1 J. & W. 140.

(*b*) *Re Tillott*, *Lee* v. *Wilson*, [1892] 1 Ch. 86; *Re Paye*, *Jones* v. *Morgan*, [1893] 1 Ch. 304, 309; *Talbot* v. *Marshfield*, 3 Ch. App. 622; *Ryder* v. *Bickerton*, 3 Sw. 80.

(*c*) *Kemp* v. *Burn*, 4 Giff. 348.

(*d*) *Re Cowin*, *Cowin* v. *Gravett*, 33 Ch. D. 179; *Ottley* v. *Gilby*, 8 Beav. 602.

(*e*) *Ottley* v. *Gilby*, *supra*.

or to supply information which necessitates expenditure (*f*), except at the cost of the beneficiary requiring the same. Art. 47.

PARAGRAPH (1).

Failure to keep accounts.

The estate of a testator who died in 1832, was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate, which fell in in 1852, was distributed, also at the request of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. A bill filed in 1872 by one of the beneficiaries against the surviving trustee for administration, was dismissed; but owing to the breach of duty committed by the trustees in not keeping accounts and vouchers, the surviving trustee had to bear his own costs (*g*). If, however, the action had been successful, the trustee would in all probability have had to pay the plaintiff's costs as well (*h*) up to the hearing (*i*). But, as the reason of this is that such costs are caused by the trustees' neglect to keep and furnish accounts, the plaintiff will not in general be entitled to costs against the trustee beyond the time when the account is actually rendered, or ordered by the court to be rendered. From this time, if the accounts are substantially accurate, the trustee will be entitled to his costs out of the estate (*k*), or, if the plaintiff sues alone, out of his share in the estate (*l*). In a recent case, however, it was held that where a trustee by his gross and indefensible neglect to furnish accounts renders an originating summons necessary, he may be ordered to pay all the costs including the costs of taking and vouching the account (*m*). It is no defence that the trustees are illiterate and incapable of keeping accounts; for in that case they would be justified by

(*f*) *Re Bosworth, Martin* v. *Lambe*, 58 L. J. Ch. 432.
(*g*) *Payne* v. *Evens*, 18 Eq. 356; and see to same effect, *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304.
(*h*) *Eylin* v. *Sanderson*, 3 Giff. 434; *Newton* v. *Askew*, 11 Beav. 145.
(*i*) *Springett* v. *Dashwood*, 2 Giff. 521; *Re Linsley, Cattley* v. *West*, [1904] W. N. 140.
(*k*) *Ottley* v. *Gilby*, 8 Beav. 602.
(*l*) *Thompson* v. *Clive*, 11 Beav. 475.
(*m*) *Re Skinner, Cooper* v. *Skinner*, [1904] 1 Ch. 289.

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necessity in employing, and be bound in point of law to employ, a competent agent to keep the accounts for them (*n*). Where trustees have rendered no account, or an insufficient one, some judges have ordered the application for an account to stand over, in order that a proper account might be rendered and vouched out of court, the costs being reserved (*o*); but it is understood that this practice has not been successful in saving expense, and that it is but rarely followed now (*p*). If the plaintiff has been over hasty in seeking the assistance of the court, he may have to pay the costs, or even his solicitor may be ordered to bear them personally (*q*).

Inaccurate accounts.

The importance of keeping accounts is shown by the fact, that although the court will generally saddle with costs a trustee whose only fault is that he has failed to do so, yet where a trustee has kept and furnished accounts, which, by an honest mistake, turn out to be inaccurate, he will be allowed his costs (*r*).

Supplying information.

"A trustee is bound to give his *cestui que* trust proper information as to the investment of the trust estate; and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, 'I have invested the trust money on mortgage,' but he must produce the mortgage deeds, so that the *cestui que* trust may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested. . . . Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee to say that it is so invested, but his *cestui que* trust is entitled to an authority from the trustee to enable him to make proper application to the bank in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered; some other person having a paramount title may have obtained a charging order on the stock, or placed a *dis-*

(*n*) *Wroe* v. *Seed*, 4 Giff. 425, 429.
(*o*) See *Re Hayter*, 32 W. R. 26, and *Hilliard* v. *Fulford*, 4 Ch. D. 389.
(*p*) See *per* KEKEWICH, J.: *Re Brown, Benson* v. *Grant*, W. N. (1895) 115.
(*q*) *Re Dartnall, Sawyer* v. *Goddard*, [1895] 1 Ch. 474.
(*r*) *Smith* v. *Cremer*, 24 W. R. 51.

tringas upon it" (*s*). At the same time, although it is the duty of a trustee to give all his beneficiaries, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is, yet it is no part of the duty of the trustee to tell his *cestui que* trust what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his *cestui que* trust in selling or mortgaging his beneficial interest, and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it, has no greater rights than the *cestui que* trust himself (*t*). If, however, the trustee has notice of an incumbrance, and deliberately represents to a proposed purchaser or mortgagee that he has no such notice, he will be liable on the ground of estoppel. This would be so even if he had forgotten the notice; unless his language was open to the interpretation —"so far as I know, there is no charge" (*u*).

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Not bound to give information as to notices of incumbrances.

PARAGRAPH (2).

As above stated a beneficiary is entitled, either personally or by his solicitor, to *inspect* the trust accounts and documents. If, however, he requires a copy of an account or document, he must pay the necessary expense himself; for it is not fair that it should be saddled on the trust estate, nor of course can the trustee be expected to incur the expense personally (*v*). On the same ground, where a beneficiary demands information as to his rights under the settlement which cannot be furnished by the trustee without the assistance of a solicitor, the trustee is not bound to incur that expense (or if he be himself a solicitor with power to charge, he is not bound to incur the loss of time), unless the beneficiary is willing to pay the costs of complying with his requisition (*x*).

Expensive information.

(*s*) *Per* CHITTY, J., in *Re Tillott, Lee* v. *Wilson*, [1892] 1 Ch., at p. 88.
(*t*) *Low* v. *Bouverie*, [1891] 3 Ch., at p. 99.
(*u*) *Burrowes* v. *Lock*, 10 Ves. 470, as explained in *Low* v. *Bouverie*, *supra*.
(*v*) *Ottley* v. *Gilby*, 8 Beav. 602.
(*x*) *Re Bosworth, Martin* v. *Lambe*, 58 L. J. Ch. 432.

CHAPTER IV.

THE POWERS OF THE TRUSTEE (*a*).

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ART. 48.—*General Powers of Trustees.*

(1) A trustee may—

(a) exercise all powers expressly (*b*) confided to him by the settlement; and

(b) subject to any restrictions contained in the settlement, and to the provisions of any statute requiring the consent of the court, may do such reasonable and proper acts for the realisation or protection of the trust property (*c*), or the

(*a*) I have excluded from this chapter any reference to the powers of managing infants' estates conferred by s. 42 of the Conveyancing and Law of Property Act, 1881, and also the powers conferred by the Settled Land Act on "trustees for purposes of that Act," because the trustees referred to in those enactments are not ordinary trustees, but rather guardians, or mere donees of powers.

(*b*) *Gisborne* v. *Gisborne*, 2 App. Cas. 300; *Austin* v. *Austin*, 4 Ch. D. 233; *Tabor* v. *Brooks*, 10 Ch. D. 273; *Re Blake, Jones* v. *Blake*, 29 Ch. D. 913; *Lord Hainsborough* v. *Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991.

(*c*) *Ward* v. *Ward*, 2 H. L. Cas. 777; *Waldo* v. *Waldo*, 7 Sim. 261; *Bright* v. *North*, 2 Ph. 220; *Bowes* v. *East London Water Co.*, Jac. 324.

protection, support or reputation of a beneficiary who is incapable of taking care of himself (*d*) as the court would sanction if applied to (*e*).

(2) Provided, that he acts honestly (*f*), and does not benefit one beneficiary at the expense of another (*g*), and does not interfere with any *legal* beneficial interest.

Paragraph (1) (a).

Discretionary powers.

The leading case of *Gisborne* v. *Gisborne* (*h*), is the best example of the right of trustees to exercise a discretion expressly given to them by the settlement. There a testator devised his real and personal estate to trustees upon various trusts, one of which was, that "my said trustees, in their discretion and of their uncontrollable authority, pay and apply the whole, *or such portion only*, of the annual income of my real and personal estate as they shall think expedient, to and for the clothing, board, etc., and for the personal and peculiar benefit and comfort, of my dear wife." The wife also had property of her own, and was a lunatic, and one of the trustees was the residuary legatee under the testator's will. Under these circumstances, the trustees, *bonâ fide* (as the court found) refused to permit the whole income of the trust fund to be applied for the wife's support in the asylum, and proposed to allow only so much for that purpose as would be sufficient, after taken into account the income of the wife's own property. The House of Lords, on these

(*d*) *Sisson* v. *Shaw*, 9 Ves. 285; *Maberly* v. *Turton*, 14 Ves. 499; *Cotham* v. *West*, 1 Beav. 381; *Ex parte Green*, 1 J. & W. 253; *Re Howarth*, 8 Ch. App. 415; *De Witte* v. *Palin*, 14 Eq. 251; *Swinnock* v. *De Crispe*, Free. 78.

(*e*) *Lee* v. *Brown*, 4 Ves. 362; *Inwood* v. *Twyne*, 2 Eden, 153; *Seagram* v. *Knight*, 2 Ch. App. 630; *Brown* v. *Smith*, W. N. (1878), p. 202. As to what acts the court can and will sanction, see p. 171, *supra*.

(*f*) See *Re Smith*, *Smith* v. *Thompson*, [1896] 1 Ch. 71.

(*g*) *Seagram* v. *Knight*, *supra*; *Lee* v. *Brown*, *supra*; *Wood* v. *Patteson*, 10 Beav. 541.

(*h*) 2 App. Cas. 300; and see also *Costabadie* v. *Costabadie*, 6 Hare, 410.

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facts, held that the trustees had an absolute discretion in the application of the fund, and that so long as they exercised that discretion *bonâ fide*, the court could not interfere with them; although if no such discretion had existed, the court would have ordered the trust fund to have been applied primarily in the support of the lunatic (*i*). So, too, where absolute discretion has been given to trustees to do a particular act (*e.g.*, to sell the trust property), the court cannot compel them to exercise the power; but if they do exercise it, the court will see that they do not exercise it improperly or unreasonably (*k*).

Discretion sometimes limited to time and manner.

The practitioner must, however, carefully scrutinize the words conferring the authority and discretion, and must not assume that a discretion as to the *mode* of applying a fund for a person's benefit, gives trustees a discretion as to *how much* of the fund is to be so applied. Thus, in *Re Weaver* (*l*) the trustees were directed to pay the income of the trust property, *at such time and in such manner* as the trustees should think fit, towards the maintenance of a lunatic during her life, with power to invest any surplus, not required for the purpose, as capital. The Court of Appeal held, however, that the trustees had only a discretion *as to the time and manner* of the application.

Powers in the nature of trusts.

A careful distinction must also be made between true discretionary powers and powers which, although discretionary in form, are really coupled with a duty. For instance, where a testator devises real estates to trustees, in trust to manage them during the minority of an infant, with power to lease in their discretion, the trustees will not be allowed to decline to exercise the power of letting. For,

(*i*) See also *Tabor* v. *Brooks*, 10 Ch. D. 273; *Re Lofthouse*, 29 Ch. D. 921; *Re Courtier, Coles* v. *Courtier*, 34 Ch. D. 136; and as to discretionary trust for maintenance, *Re Bryant, Bryant* v. *Hickley*, [1894] 1 Ch. 324. No discretionary powers can be exercised after the trustees have paid the trust fund into court (*Re Murphy*, [1900] 1 I. R. 145).

(*k*) *Tempest* v. *Lord Camoys*, 21 Ch. D. 571; *Marquis of Camden* v. *Murray*, 16 Ch. D. 161; *Re Blake, Jones* v. *Blake*, 29 Ch. D. 913; *Re Courtier, Coles* v. *Courtier*, *supra*; and *Re Burraye, Burningham* v. *Burraye*, 62 L. T. 752.

(*l*) 21 Ch. D. 615. See also similar distinctions as to time and mode of sale, *Re Atkins, Newman* v. *Sinclair*, 81 L. T. 421.

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as Bowen, L.J., said in *Re Courtier, Coles* v. *Courtier* (*m*), "one can understand that, where the machinery for management of the estates is given to the trustees, and the court undertakes to enforce the trusts for management, it is right for it to compel the trustees to utilize the machinery entrusted to them." In fact, the court looks at the substance rather than the form; and where what appears to be a mere discretionary power is, in reality, part of a trust for management, the court will order the trustees to exercise the power (*n*).

Paragraph (1) (b).

Implied discretionary powers.

With regard to the principles enunciated in sub-clause (b) the case of *Ward* v. *Ward* (*o*) may be cited. There, by the immediate realisation of the trust property, the trustee would have ruined one beneficiary from whom a large debt was due to the trust estate, and would have very seriously prejudiced others. Instead of doing so, the trustee made an arrangement with the debtor for payment of the money by instalments; and it was held that he was justified in taking that course, because he had exercised a sound discretion, and such as the court would have approved. But in all such cases a trustee should apply for the sanction of the court, under the provisions of Order LV., r. 3.

Power to do all necessary acts for protecting the trust property.

So, again, as was said by Lord Cottenham in *Bright* v. *North* (*p*), "Every trustee is entitled to be allowed the reasonable and proper expenses incurred in protecting property committed to his care. But if they have a right to protect property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable;" and, therefore, his lordship allowed the trustees (who were, in that instance, trustees of public

(*m*) 34 Ch. D. 136. See also *Re Hill, Hill* v. *Pilcher*, [1896] 1 Ch. 962.
(*n*) *Tempest* v. *Lord Camoys*, 21 Ch. D. 576, note; *Nickisson* v. *Cockhill*, 3 De G. J. & S. 622.
(*o*) 2 H. L. Cas. 784.
(*p*) 2 Ph. 220; and see *Stott* v. *Milne*, 25 Ch. D. 710.

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works) the expenses of opposing a bill in Parliament which would have been prejudicial to those works if passed. Here again, however, trustees should always be advised to obtain the sanction of the court before incurring such serious expense, under s. 36 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

Power to take necessary steps for keeping property in repair.

On the same grounds, a trustee whose duty it is to keep property, forming part of the trust estate, in repair, may, it would seem, retain income for that purpose; but without prejudice to the ultimate rights of the tenant for life and remainderman *inter se* (*q*).

Power to exchange policy for a fully paid-up one.

On similar grounds, it would seem that a trustee may surrender a policy of assurance forming part of the trust property, in exchange for a fully paid-up one of less amount, in cases where the party liable to pay the premiums cannot possibly do so (*r*). But of course no sane lawyer would allow a trustee who was his client to do this without the sanction of the court.

Power to thin timber.

So, again, in cases where the court would, if applied to, authorise the cutting down of timber which has arrived at maturity, and which would only degenerate if allowed to stand, or where it is necessary to cut it for the purpose of thinning it, the trustee may fell it on his own authority (*s*).

Power to grant certain leases.

On the same principle, a trustee who has the management of property, may grant a reasonable agricultural lease (*t*), unless expressly or impliedly (*u*) restrained from doing so by the settlement. But he may not grant a mining lease, for that would benefit the tenant for life at the expense of the reversioner (*x*). Moreover, where there

(*q*) *Re Fowler. Fowler* v. *Odell*, 16 Ch. D. 723; but see *supra*, pp. 204 *et seq.*

(*r*) *Re Steen, Steen* v. *Peebles*, 25 L. R. Ir. 544.

(*s*) *Waldo* v. *Waldo*, 7 Sim. 261; and see *Seagram* v. *Knight*, 2 Ch. App. 630; but see Illustration, p. 283, *infra*.

(*t*) *Naylor* v. *Arnitt*, 1 R. & M. 501; *Bowes* v. *East London Water Co.*, Jac. 324; *Att.-Gen.* v. *Owen*, 10 Ves. 555; *Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35.

(*u*) *Evans* v. *Jackson*, 8 Sim. 217; and see *Micholls* v. *Corbett*, 34 Beav. 376.

(*x*) *Wood* v. *Patteson*, 10 Beav. 541. But this is now provided for on equitable terms by the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

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is a tenant for life, his consent would now be necessary under s. 56 of the Settled Land Act, 1882.

Sometimes power to mortgage.

In a recent case, Kekewich, J., held that a power to make outlays in repairs or improvements, etc., out of income *or capital*, impliedly authorised the trustees to mortgage the property for the purpose of raising the necessary money out of capital (*y*).

No power to make problematical or speculative improvements.

On the other hand, trustees must not do acts, however beneficial they may possibly be to the property, if they are in their nature unreasonable or problematical. For instance, they ought not to make merely ornamental improvements (*z*), nor to take down a mansion-house for the purpose of rebuilding a better one (*a*), nor to build a villa for the mere improvement of the estate (*b*). If, however, they are by the settlement expressly given a power "generally to superintend the management of the estate," it would seem that their powers of management are almost unlimited, so long as they are exercised *bonâ fide* (*c*). Trustees are also empowered to carry out certain specified improvements by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114); but practically these have been superseded by the corresponding powers given to the tenant for life by the Settled Land Acts, 1882 to 1890.

Power to retain married women's trust funds to enable them to claim equity to a settlement.

With regard to acts for the benefit of the beneficiaries, a familiar instance occurs in the case of trusts of personalty for married women, where, if the trustee paid over the fund to the husband, the wife would probably get no benefit from it. In such case the trustee is justified, if he thinks fit, in refusing to pay the money to the husband, and in paying it into court instead, so that the wife may have every facility for enforcing her equity to a settlement (*d*). But this right has, it is apprehended, ceased in the case of property coming

(*y*) *Re Bellinger*, *Durrell* v. *Bellinger*, [1898] 2 Ch. 534.
(*z*) *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.
(*a*) *Bleazard* v. *Whalley*, 2 Eq. Rep. 1093.
(*b*) *Vyse* v. *Foster*, L. R. 7 H. L. 318.
(*c*) *Bowes* v. *Earl of Strathmore*, 8 Jur. 92; and see also as to powers of building, etc., *Re Leslie*, 2 Ch. D. 185; and consider principle in *Gisborne* v. *Gisborne*, 2 App. Cas. 300.
(*d*) Wat. 360; *Re Swan*, 2 H. & M. 34; *Re Bendyshe*, 3 Jur. (N.S.) 727.

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under the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Power to allow maintenance to infants.

So, trustees might always allow, by way of maintenance, a competent part of the income of property to the father of an infant beneficiary (*e*), where the father could not support it *according to its position* (*f*), even where there was a trust for accumulation (*g*), if the circumstances showed that the settlor looked on the infant as his heir (*h*); and, if the infant were an orphan, maintenance might be allowed to the mother (*i*), or stepfather (*k*), whether they could support it or not. And now, as will be seen under Article 52 (*infra*, p. 290), the powers of trustees in relation to the maintenance of infants are greatly enlarged. It has been also held that a trustee may under special circumstances, as, for instance, where the capital is considerably under a thousand pounds (*l*), allow maintenance out of the capital; but a trustee would be very ill-advised to take upon himself the responsibility of doing so (*m*).

Power to advance.

Upon the same principle, a trustee may apply part of an infant's capital for its advancement in the world (*n*). But here, again (in the absence of express power), he would be undertaking an unnecessary risk in acting without the sanction of the court.

Cases where infant only contingently entitled.

But where, by making an advancement, the trustee would injure the contingent rights of another beneficiary, he will do it at his peril as against the latter (*o*). For instance,

(*e*) *Sisson* v. *Shaw*, 9 Ves. 285; *Maberly* v. *Turton*, 14 Ves. 499; *Cotham* v. *West*, 1 Beav. 381.

(*f*) Maintenance has been allowed to a father with an income of £6,000 a year (*Jerroise* v. *Silk*, 1 G. Coop. 52; and see *Re Allan, Harelock* v. *Harelock*, 17 Ch. D. 807).

(*g*) *Re Collins, Collins* v. *Collins*, 32 Ch. D. 229; *Re Allan, Harelock* v. *Harelock, supra*; *Re Colyan*, 19 Ch. D. 305; *Re Thatcher's Trusts*, 26 Ch. D. 426.

(*h*) See *Re Alford, Hunt* v. *Parry*, 32 Ch. D. 382.

(*i*) *Douglas* v. *Andrews*, 12 Beav. 310.

(*k*) Lew. 492, commenting on *Billingsley* v. *Critchett*, 1 B. C. C. 268, as affected by 4 & 5 Will. 4, c. 76, s. 57.

(*l*) *Barbar* v. *Grant*, 1 Vern. 255; *Ex parte Green*, 1 J. & W. 253; *Re Howarth*, 8 Ch. App. 415; *De Witte* v. *Palin*, 14 Eq. 251.

(*m*) See *Walker* v. *Wetherell*, 6 Ves. 473.

(*n*) *Swinnock* v. *De Crispe*, Free. 78; *Boyd* v. *Boyd*, 4 Eq. 305; *Roper-Curzon* v. *Roper-Curzon*, 11 Eq. 452.

(*o*) *Worthington* v. *M'Crae*, 23 Beav. 81; *Re Breeds's Will*, 1 Ch. D. 226.

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where £100 was bequeathed upon trust to apply the income towards the maintenance and education of A. during his minority, and upon trust to pay the corpus to him on attaining twenty-one, but in case of his dying before that age, upon trust for X., it was held that, as against X., the trustees had no authority to advance part of the capital to A., who died before attaining his majority (*p*).

Paragraph (2).

For illustrations of the principle that a trustee must not exercise his powers so as to unduly benefit one beneficiary at the expense of others, the reader is referred to Article 35, p. 175, *supra*. But, as pointed out there, it bends to a plainly expressed intention on the part of the settlor to the contrary.

No power to interfere with legal remainders.

With regard to the principle that the court in general cannot interfere with legal interests, it is apprehended that a trustee for another for life only (the trustee merely taking an estate *pur autre vie*), would not be justified, without the consent of the *legal* remainderman, in cutting timber which had arrived at maturity. For, not being the trustee for the remainderman, he could not do acts for the benefit of the estate generally which would be in derogation of the latter's legal rights (*q*); nor could he invest the proceeds so as to equitably arrange the benefit between the tenant for life and the remainderman.

On the same principle, it would seem, that although, where the whole legal estate is vested in trustees, the court can authorise them to mortgage the trust property for the purpose of raising money to carry out necessary repairs (*r*); yet, on the other hand, where the legal estate is not in the trustees, but in an infant tenant for life, the court has no jurisdiction to do so (*s*).

(*p*) *Lee* v. *Brown*, 4 Ves. 362.
(*q*) See and consider *Seagram* v. *Knight*, 2 Ch. App. 630, and compare it with *Waldo* v. *Waldo*, 7 Sim. 261, and *Gent* v. *Harrison*, John. 517.
(*r*) *Re Jackson*, *Jackson* v. *Talbot*, 21 Ch. D. 786.
(*s*) *Jesse* v. *Lloyd*, 48 L. T. 656.

Art. 49.

ART. 49.—*Power of Trustees in relation to the conduct of Sales.*

(1) Where a trust for sale is vested in trustees they may carry out the sale as follows:

(a) In such manner, and either alone or jointly with any adjoining or any co-owner, as (having regard to all the surrounding circumstances) may be reasonable and for the probable benefit of the beneficiaries (*t*). But, unless the trust was created by a settlement coming into operation after 27th August, 1860 (*u*), they cannot buy in the property at an auction (*w*), or, *semble*, rescind a contract for sale. He may accept a cheque for the deposit (*x*).

(b) If the settlement first came into operation after the 31st of December, 1883, then (unless expressly forbidden) they may sell subject to prior charges or not, and may concur with any other person in selling, without the necessity of making inquiries as to whether the course adopted is the best (*y*).

(c) By leave of the court (but not otherwise) they may sell the surface, reserving the minerals, with incidental powers of working the same (*z*).

(*t*) See *Re Cooper and Allen*, 4 Ch. D. 802.
(*u*) Lord Cranworth's Act (23 & 24 Vict, c. 145), ss. 1, 2, 34.
(*w*) *Taylor* v. *Tabrum*, 6 Sim. 281; *Ex parte Lewis*, 1 Gl. & J. 69.
(*x*) *Farrer* v. *Lacy, Hartland & Co.*, 31 Ch. D. 42.
(*y*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13 (1), re-enacting Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 35.
(*z*) Trustee Act, 1893, s. 44.

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(2) Where the property is of leasehold tenure the sale cannot (in the absence of express power) be made by way of underlease (*a*).

(3) The conditions subject to which the sale is made should not be unnecessarily depreciatory (*b*).

(4) A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874 (*c*).

Paragraph (1).

Power to sell under the old law independent of statute.

For an example of the law relating to old settlements, the case of *Re Cooper and Allen* (*d*) may be cited. The question in that case was whether persons who were mortgagees of a life estate, and also mortgagees (for a different sum) of the reversion, with power of sale under both mortgages, could sell the fee simple in possession. The late Sir George Jessel, M.R., in giving judgment, said: "First of all, on principle, what is the duty of trustees for sale? It is their duty to sell the estate to the best advantage they can, that is, in the manner most beneficial to the *cestuis que* trust. It is, further, their duty to take care to receive the purchase-money, and to invest it properly according to the trusts. If, therefore, the sale of the property can be effected at a higher price by joining with somebody else, so far from that being a breach of that principle, they are only carrying out their trusts, and performing their duty in so obtaining that higher price. . . . Secondly, it is their duty, as I have already said, to receive the purchase-money. If, therefore, they do join with any other person, whether

(*a*) *Re Walker and Oakshott*, [1901] 2 Ch. 383; affirmed, [1902] W. N. 147.

(*b*) But a depreciatory condition does not now avoid the sale unless it appears that the price was thereby rendered inadequate, nor can the sale be impeached after conveyance on that ground unless the purchaser and trustee were acting collusively; nor can a purchaser now make any objection to a title on the ground that a condition of sale was unnecessarily restrictive. See Trustee Act, 1893, ss. 14, 15, and *supra*, p. 214.

(*c*) Trustee Act, 1893, s. 14.

(*d*) 4 Ch. D. 802.

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that other person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them, and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, where they do join with other people, the purchase-money must be so apportioned before the completion of the purchase, and must be paid by the purchaser; the apportioned part coming to the trustees being paid to them." His lordship then proceeded to point out that the trustees were the proper persons to make the apportionment, and that unless a purchaser has notice that the apportionment is an improper one, he would be quite safe in accepting the trustees' apportionment. He then examined the cases in which the joinder with other parties was *primâ facie* right, and those in which it required evidence to support it; pointing out that in the case of adjacent properties, as a general rule, trustees should not agree to a joint sale without some evidence of its desirability, but that in the case of trustees entitled only to a limited or partial estate in property, it is obviously, and without the necessity of proof, for the benefit of the estate that they should join in a sale of the entire fee simple with the other parties interested.

No power formerly to buy in at a sale by auction.

As an instance of the inability of trustees under old settlements to buy in the property at an auction may be mentioned a case in which the assignees of a bankrupt had bought in two lots of the bankrupt's property, and upon the subsequent sale of the two lots, had gained on one, and lost on the other. It was held by Lord ELDON, that the original buying in of the two lots being a breach of trust, the assignees were liable for the loss (if any) on each lot, and could not set off the gain on one against the loss on the other (*e*). But it is conceived that this somewhat harsh decision would scarcely be followed at the present day.

PARAGRAPH (2).

Sale of leaseholds by way of underlease.

If it were lawful, it would often be extremely convenient for trustees for sale of leaseholds, to carry out the sale by

(*e*) *Ex parte Lewis*, 1 Gl. & J. 69.

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means of a sub-lease. For instance, where several houses are comprised in a single building lease, it is simpler if they be sold separately to execute a sub-demise to each purchaser for the residue of the term less one day, at a proportionate part of the entire rent. If this be not done the rent would have to be apportioned, and if the landlord did not consent, there would have to be elaborate cross covenants and powers of distress and entry between the several purchasers (*f*). However, it has been held that, notwithstanding its convenience, this method cannot be adopted by trustees for sale, for it does not get rid of the property out and out nor of the liability of the trustees as assignees of the lease (*g*).

Art 50.—*Power of Trustees to give Receipts.*

The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power will effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof (*h*).

The above rule is comparatively modern, dating only from 1881, when it formed s. 36 of the Conveyancing and Law of Property Act of that year. It applies, however, quite irrespective of the date of the settlement, and consequently no questions of practical interest can arise under the old law, which is therefore omitted in this Edition.

(*f*) See *Re Webb, Still* v. *Webb*, [1897] 1 Ch. 144.
(*g*) *Re Walker and Oakshott*, [1901] 2 Ch. 383; affirmed [1902] W. N. 147.
(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20.

Art. 51.

ART. 51.—*Power to compound and to settle Disputes.*

"(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient" (*i*).

"(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith" (*k*).

"(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained" (*l*).

The above article constitutes the first three sub-sections of s. 21 of the Trustee Act, 1893, which is merely a

(*i*) Trustee Act, 1893, s. 21 (1).
(*k*) *Ibid.* s. 21 (2).
(*l*) *Ibid.* s. 21 (3).

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re-enactment of s. 37 of the Conveyancing and Law of Property Act, 1881. What the effect of the section may be is by no means clear. In *Re Owens, Jones* v. *Owens* (*m*), the late Sir George Jessel, M.R., intimated that the probable effect of it was to "revolutionize the law on the subject," and to make the question in every case one entirely of *good faith*, quite apart from any question of prudence. On the other hand, it has been suggested that the section is merely a statutory expression of the law of the court (*n*), with this important difference, that it "shifts the *onus* of proof, where any particular transaction is impeached, from the trustee to the *cestui que* trust. Formerly a trustee had to justify his action in compromising, compounding, etc.; henceforth the dissatisfied *cestuis que* trust must prove *impropriety of motive*" (*o*). However, in a case decided since the Act, Lopes, L.J., laid it down broadly, that the only excuse for not taking action to enforce payment of a debt due to the trust, is, "a *well founded* belief on the trustee's part, that such action would be useless, and *that the burden of proving the grounds of such well-founded belief* is on the trustee" (*p*). If this be indeed so, it is difficult to give any meaning whatever to the section; but it is only fair to add that the section was not drawn to the attention of the court when the Lord Justice made the above observation, and that very probably it was not applicable to that case (*q*).

Power must be exercised by all the trustees jointly.

Although the wording of the Act is open to criticism, it must (it is conceived) be construed to mean that the power must be exercised by all the trustees jointly, and can only be exercised by a sole trustee in cases where he is expressly authorised to execute the trusts; and that it cannot be construed (as doubtfully suggested by the learned authors above quoted) to enable *any two* of a greater number of trustees to compromise or compound without the joinder of their fellows.

(*m*) 47 L. T. 61; and see p. 210, *supra*.
(*n*) See Lewin, 512, 7th ed.; *Wiles* v. *Gresham*, 5 De G. M. & G. 770; *Ex parte Ogle*, 8 Ch. App. 711.
(*o*) Brett and Clerke's Conveyancing, etc. Acts, 3rd ed., 159.
(*p*) *Re Brogden, Billing* v. *Brogden*, 38 Ch. D. 546, 574.
(*q*) The neglect in that case took place before the Act of 1881. Moreover two of the trustees were also executors of the debtor and personally interested in his estate.

Art. 52.

ART 52.—*Power to allow Maintenance to Infants.*

(1) Where property is held in trust for an infant for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, in their discretion, make an allowance for his maintenance, education, or otherwise for his benefit. This power is exercisable notwithstanding that there is another fund applicable to the same purpose, or some person bound by law to provide for such maintenance and education. The trustees may pay the allowance to the guardian or parent (*r*) of the infant instead of expending it directly themselves (*s*).

(2) The above power only applies to contingent interests—

(a) where the intermediate income goes along with the corpus (*t*) ; or

(b) in case of portions charged on land (*u*).

ILLUSTRATIONS OF PARAGRAPH (2).

Cases to which the power applies.

Although the statute allows maintenance out of the income of a *contingent* legacy or fund, yet if, on the true construction of the settlement, that income is payable to someone else during the infancy, and is not to be accumulated so as to pass along with the corpus if and when it vests, the infant will not (with the exception hereinafter

(*r*) *Re Cotton*, 1 Ch. D. 232.

(*s*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43.

(*t*) *Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331 ; *Re Judkin's Trusts*, 25 Ch. D. 743 ; *Re George*, 5 Ch. D. 837 ; *Re Collins, Collins* v. *Collins*, 32 Ch. D. 229 ; *Re Jeffery, Burt* v. *Arnold*, [1891] 1 Ch. 671 ; *Re Burton, Banks* v. *Heaven*, [1892] 2 Ch. 38 ; *Re Humphreys, Humphreys* v. *Levett*, [1893] 3 Ch. 1 ; *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329.

(*u*) *Re Greaves, Jones* v. *Greaves*, [1900] 2 Ch. 683.

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referred to of portions charged on land) be entitled to be maintained. For if he were, his maintenance would come, not out of his own contingent property, but out of somebody else's income, which would be manifestly unjust. Consequently the first question which the practitioner has to solve in all cases of maintenance (except as aforesaid) is, whether or not the income of the fund will go along with the capital, if and when the latter vests in the infant. If it will, then maintenance may be safely allowed. If it will not, then maintenance must be refused.

Whether the gift comprises intermediate income is a question of construction.

The question is not so much a question of law as one of the interpretation of the settlement. Still, it may be useful to sum up the decisions so far as they afford any principle or rule of construction. It would seem, then, that a general *residuary* but contingent bequest of *personal* estate includes the intermediate income (*x*); that a similar devise of *real* estate does not (*y*); but that a blended gift of both real and personal estate *primâ facie* includes the intermediate income of both (*z*). On the other hand, a general or specific legacy or devise does not carry the intermediate income unless (1) the donor stands *in loco parentis* to the infant, and has provided no other fund for maintenance (*a*); (2) the income is expressly directed to be applied for maintenance, or (3) the gift is expressly or impliedly directed to be at once set apart (*b*).

Portions charged on land.

There is, however, an exception to the general rule with regard to contingent portions charged on land. Although such gifts do not vest until they are wanted, viz., in case of sons at twenty-one, or in case of daughters at twenty-one or marriage, and do not carry intermediate income, yet an infant contingent portioner is entitled to such a rate of

(*x*) *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329.
(*y*) *Lord Bective* v. *Hodyson*, 12 W. R. 625.
(*z*) *Genery* v. *Fitzgerald*, Jac. 468; *Re Dumble, Williams* v. *Murrell*, 23 Ch. D. 360; *Re Burton, Banks* v. *Heaven*, [1892] 2 Ch. 38.
(*a*) *Re Moody, Woodroffe* v. *Moody*, [1895] 1 Ch. 101; *Re George*, 5 Ch. D. 837.
(*b*) *Re Clements, Clements* v. *Pearsall*, [1894] 1 Ch. 665; *Re Medlock, Ruffle* v. *Medlock*, 54 L. T. 828. As to leaseholds, *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309. See also *Re Holford, Holford* v. *Holford*, [1894] 3 Ch. 30; *Guthrie* v. *Walrond*, 22 Ch. D. 573; and *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329.

Art. 52. Residuary gift to infant.

interest or allowance in respect of his or her portion as the court may deem necessary for maintenance (*c*).

It may be added that a gift of residue to an infant *makes the executor a trustee*, and enables him to allow maintenance under this article (*d*).

ART. 53.—*Power of Trustees to pay to Attorney appointed by Beneficiary.*

A trustee acting or paying money in good faith and without notice, under or in pursuance of any power of attorney, is not liable by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power. But this does not affect the right of any person entitled to the money against the person to whom the payment is made; and the person so entitled has the same remedy against the person to whom the payment is made, as he would have had against the trustee (*e*).

The above article, although restricted in terms to trustees, is but little more than the general law now applicable to all persons acting upon the faith of a power of attorney. For s. 47 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), gives protection to every person so acting, notwithstanding that before the payment or act the donor of the power had died, or become lunatic or of unsound mind, or bankrupt, or had revoked the power, provided the fact of such death, lunacy, unsoundness of mind, or bankruptcy or revocation, was not, at the time of the payment or act, known to the person making or doing the same.

(*c*) *Per* FARWELL, J.: *Re Greares, Jones* v. *Greares*, [1900] 2 Ch. 683.
(*d*) *Re Smith, Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302.
(*e*) Trustee Act, 1893, s. 23, re-enacting 22 & 23 Vict. c. 35, s. 26.

Art. 54.—*Suspension of the Trustee's Powers by Administration Action.*

(1) Where a judgment has been given for the execution of the trust by the court, or (before judgment) an injunction has been granted, or a receiver appointed, the trustee can only exercise his powers with the sanction of the court (*f*).

(2) But although its sanction must be obtained, the court will not interfere with a discretion reposed in a trustee and expressed to be absolute and uncontrollable, so long as it is exercised in good faith (*g*).

(3) A decree for administration does not absolve a trustee from the performance of his *duties* (*h*).

Illustrations.

Thus a trustee cannot, after a decree in an administration suit, prosecute or defend legal proceedings (*i*), nor execute a power of sale (*k*), nor make repairs (*l*), nor invest (*m*), nor exercise any other power, without applying to the court to sanction his doing so. However, it would seem that, although a trustee may be personally liable for acting without the consent of the court after judgment for general administration, yet, if he does so act, he will be able to confer a good title on parties who have no notice of the judgment with regard to personal estate, although the

After judgment.

(*f*) *Mitchelson* v. *Piper*, 8 Sim. 64; *Shewen* v. *Vanderhorst*, 2 R. & M. 75; *Minors* v. *Battison*, 1 App. Cas. 428; *Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134. The mere issue of a writ for administration does not affect the trustee's powers (*Berry* v. *Gibbons*, 8 Ch. App. 747).

(*g*) *Gisborne* v. *Gisborne*, 2 App. Cas. 300; and see Illustrations, Art. 48, *supra*, pp. 277 *et seq.*

(*h*) *Garner* v. *Moore*, 3 Drew. 277.

(*i*) *Jones* v. *Powell*, 4 Beav. 96.

(*k*) *Walker* v. *Smallwood*, Amb. 676.

(*l*) *Mitchelson* v. *Piper*, *supra*.

(*m*) *Bethell* v. *Abraham*, 17 Eq. 24.

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action be registered as a *lis pendens* (*n*). It is, however, submitted that this would not apply to real estate where the *lis pendens* is duly registered.

Before judgment

But where an executor or administrator, after the commencement of a creditor's administration action, and before judgment, has voluntarily paid any creditor in full, he will be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment; and it is apprehended the same principle would be equally applicable to trustees. To prevent such payments being made in any such case, the plaintiff should, immediately upon issuing his writ, apply for and obtain a receiver (*o*).

Powers of trustees who have paid money into court.

It may be conveniently mentioned here, that where trustees have paid the trust fund into court under s. 42 of the Trustee Act, 1893 (which re-enacts the Trustee Relief Act), they can no longer exercise any of their powers, discretionary or otherwise. For the payment into court is, in effect, a retirement by the trustees from their office, and a relinquishment of the judgment and discretion confided to them by the settlor (*p*).

(*n*) *Berry* v. *Gibbons*, 8 Ch. App. 747.

(*o*) *Re Radcliffe, European Ass. Society* v. *Radcliffe*, 7 Ch. D. 733; and see also *Re Barrett, Whitaker* v. *Barrett*, 43 Ch. D. 70, where it was held that notwithstanding an *order for an account*, an executrix could still prefer a creditor, even although that creditor was herself in the character of trustee of a settlement.

(*p*) *Re Nettlefold*, 59 L. T. 315.

CHAPTER V.

POWER OF THE BENEFICIARIES.

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ART. 55.—*Power of a sole Beneficiary or of the Beneficiaries collectively.*

If there is only one beneficiary, or if there are several and they are all of one mind, and he or they are not under any disability (*a*), the specific performance of the trust may be arrested, and the trust modified or extinguished.

Illustration in case of a simple trust

Thus, if property be devised unto and to the use of a trustee in fee simple, upon trust to pay testator's debts, and subject thereto, upon trust for testator's widow for life, and after her death upon trust for B. absolutely; B., on the death of the widow and after payment of the debts, will be entitled to call upon the trustee to vest the property absolutely in him. For in equity B. is the sole and absolute owner, and the court will not permit a person, solely and absolutely entitled, to be subjected to the tutelage or interference of a trustee. The court, in fact, regards a trustee

(*a*) *I.e.*, infants, lunatics, and married women, restrained from anticipation. If a married woman who is *not* so restrained, is yet not entitled for her separate use either by settlement or statute, she can only arrest the trust subject to the provisions of the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74), and Malins' Act (20 & 21 Vict. c. 57). Nor must it be forgotten that the latter statute does not enable such a *feme covert* to deal with future interests in personal estate coming to her under her marriage settlement.

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as a kind of intermediary or stakeholder, whose office is to hold the scales evenly, and to see that the rights of several persons are mutually respected. But where there is only one person interested, and that person is *sui juris*, the trustees' *raison d'être* ceases to exist; and consequently he himself becomes merely a person in the legal possession of another person's estate (*b*).

Illustration in case of a special trust where parties interested elect to stop it.

The above is a case of a simple trust where, even under the terms of the trust, the trustees had no longer any active duties to perform. But the same result follows even where the settlor has contemplated and intended that the trustee shall have the control of the property, if the sole party beneficially interested, or the parties collectively if there are several of them, are unanimously in favour of "breaking the trust," and are all *sui juris*. Thus, in one case, a testator gave his residuary personal estate to an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal and accumulations to the infant on his attaining twenty-*four*, and in the meantime to allow £60 a year for his maintenance. In the event of the infant's dying under twenty-*one* the testator gave the estate to third persons. The court held that on the true construction of the will, the infant took an absolute vested and transmissible interest on attaining twenty-one; and that, consequently, being the only person beneficially interested, he could put an end to the trust, and was entitled to have the residue and accumulations at once transferred to him (*c*). For, as the late Vice-Chancellor PAGE WOOD said, in the case of *Gosling* v. *Gosling* (*d*): "The principle of this court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by will, notwithstanding any

(*b*) *Smith* v. *Wheeler*, 1 Mod. 17; *Brown* v. *How*, Barn. 354; *Att.-Gen.* v. *Gore*, *ib.* 150; *Kaye* v. *Powel*, 1 Ves. 408; and *per* FRY, J., *Re Cotton's Trustees and London School Board*, 19 Ch. D. 627.

(*c*) *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, Cr. & Ph. 240; *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Johnston*, *Mills* v. *Johnston*, [1894] 3 Ch. 204; and distinguish *Re Travis*, *Frost* v. *Greatorex*, [1900] 2 Ch. 541. *Talbot* v. *Jevers*, 20 Eq. 255, appears to be inconsistent with these cases.

(*d*) Johns. 265, and see judgment of MALINS, V.-C., *Bubb* v. *Padwick*, 13 Ch. D. 517. FRY, J., dissented from this case in *Re Chaston*, *Chaston* v. *Sago*, 18 Ch. D. 218, but on grounds immaterial to the present point.

directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one."

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Otherwise where intermediate interest does not go to same beneficiary.

The above cases must, however, be carefully distinguished from those in which the settlement gives the trustees a discretion to apply the income until the given age for the maintenance of a class of beneficiaries, *or any one or more of them to the exclusion of the others*. For, in that case, until the youngest member of the class attains the given age, it is impossible to say that any member of the class has an absolute right to the income of his share. Consequently, he is not the only person interested in his share, and cannot call for the payment of it (*e*).

Bequest of a sum of consols to purchase a life annuity.

Again, in *Re Brown* (*f*) there was a bequest of consols in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity for her maintenance. The legatee *being unmarried*, and the restraint on anticipation being therefore nugatory, it was held that she was entitled to a transfer of the consols into her own name (*g*). A similar result followed even where the testator directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell it, it should cease, and form part of the residuary estate (*h*).

Absolute gift to daughters with direction to settle upon themselves at marriage.

So, where a testator directed his property to be divided into nine shares, and gave one and a half share to each of

(*e*) *Re Coleman, Henry* v. *Strong*, 39 Ch. D. 443. But distinguish *Kearsley* v. *Woodcock*, 3 Ha. 185, where the words above italicised were not in the will, and it was held that the trustee in bankruptcy of one beneficiary was entitled to a part of the income to be ascertained by inquiry (*sed quære*).

(*f*) 27 Beav. 324.

(*g*) See also *Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Buttanshaw* v. *Martin*, Johns. 89; *Wright* v. *Wright*, 2 J. & H. 647; *Cooke* v. *Fuller*, 26 Beav. 99; *Barton* v. *Briscoe*, Jac. 603; *Re Gaffee*, 1 M. & G. 547; *Re Linzee's Settlement*, 23 Beav. 241.

(*h*) *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285.

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his two daughters, "to be settled on themselves at their marriage," it was held by Sir JAMES BACON, V.-C., that, *on the true construction of the will* (inasmuch as there was no reference to grandchildren, or any intimation of the testator's desire to restrict the gift to a life interest), the daughters took absolutely, and if so, then under the above rule they were entitled to have their shares paid over to them on attaining twenty-one, free from all liability to have the same settled (*i*). Whether the learned judge's construction of the will was correct may perhaps be respectfully doubted (*k*). Anyhow, the reader must carefully distinguish the above case from those in which there is a direction to settle on a daughter *and her issue* (*l*), where of course she would not be the only person beneficially interested, and consequently would not be entitled to demand the capital.

Direction to sell estate and divide proceeds.

On similar principles, where an estate is directed to be sold and the proceeds to be divided among several persons, although no one singly can elect that his own share shall not be disposed of, but shall remain realty (*m*), yet if *all* the beneficiaries agree to take the land unconverted, they can put an end to the trust, and insist upon their right to do so (*n*). But until they do so elect the trust subsists. Where, however, there is no *trust* for sale, but merely a *power* of sale, the rule is subject to this modification, viz., that the trustees can still exercise the power after all the beneficial interests in the property have, under the trusts, become absolutely vested in persons who are *sui juris, if, on the construction of the settlement, it appears to be the intention of the settlor that it should be then exercised*, and provided that the power in its creation was

(*i*) *Magrath* v. *Moorehead*, 12 Eq. 491; *Re Jordan's Trusts*, [1903] 1 I. R. 119.

(*k*) See *Loch* v. *Bayley*, 4 Eq. 122.

(*l*) See, for example, *Wise* v. *Piper*, 13 Ch. D. 848.

(*m*) *Holloway* v. *Radcliffe*, 23 Beav. 163; *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 *ib.* 315; and see judgment of CHITTY, J.: *Re Dawson, Bowen* v. *Churchill*, [1893] 3 Ch., at p. 424.

(*n*) *Re Cotton's Trustees and London School Board*, 19 Ch. D. 624; *Harcourt* v. *Seymour*, 2 Sim. (N.S.) 12; *Cookson* v. *Reay*, 5 Beav. 22; *Dixon* v. *Gayfere*, 17 Beav. 421.

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not obnoxious to the rule against perpetuities (*o*). It is apprehended that it follows that, in such a case, no one of the beneficiaries can insist upon having his undivided share in the legal estate conveyed to him by the trustees; for that would place it out of the trustees' power to exercise the power of sale confided to them for the benefit of all the beneficiaries. Where, however, there is a trust for sale to be made at a date which might infringe the rule against perpetuities (*e.g.*, on the death of the survivor of the testator's daughter and any husband whom she might leave surviving her), then, although the trust for sale will be void, the trust in favour of the beneficiaries will be valid if they be persons who could certainly be ascertained within the period allowed by the rule; *e.g.*, children of the daughter who should attain twenty-one. In such cases the trust for sale will be construed as mere machinery for effecting a division, and will be disregarded, and the beneficiaries will take the property as real estate (*p*).

Joinder of all beneficiaries where entitled successively.

The above examples deal only with cases in which there was either one beneficiary only, or several entitled as tenants in common or joint tenants. The same principle, however, is equally applicable where the trust is for persons in succession, and they unanimously desire to put an end to the trust (*q*). Thus, if the trust be for A. for life with remainder for his wife B. for life for her separate use, with remainder to X. Y. and Z. absolutely, then A., B., X., Y. and Z. being collectively the absolute and only owners, can join together in putting an end to the trust, and calling on the trustees to deal with the property, whether real or personal, as they may direct. Even where it is not *absolutely* certain that no more beneficiaries can come into existence, but it is morally

(*o*) *Re Cotton's Trustees and London School Board*, 19 Ch. D. 624; *Peters* v. *Lewes and East Grinstead Rail. Co*, 18 *ib.* 429; *Re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334, discussed in *Re Dyson and Fowke*, [1896] 2 Ch. 720.

(*p*) *Re Appleby*, *Walker* v. *Lever*, [1903] 1 Ch. 565; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron*, *Bowen* v. *Churchill*, *ib.* 421.

(*q*) *Palairet* v. *Carew*, 32 Beav. 564; *Re White*, *White* v. *Edmond*, [1901] 1 Ch. 570; even where the parties entitled in remainder are merely trustees of a subsidiary settlement they and the life tenant under the original settlement can call for a transfer of the fund (*Anson* v. *Potter*, 13 Ch. D. 141).

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so (*e.g.*, where the ultimate remainder is in trust for the children of a woman who is past the age of child-bearing) the court will on summons give the trustees liberty to act according to the directions of the beneficiaries *in esse* so long as the contingent rights of living persons are not prejudiced (*r*), although it is understood that the court will not in such cases imperatively *order* the trustees to do so (*s*).

Mortgagee of all the beneficial interests.

The question is sometimes asked, whether a mortgagee of an only beneficiary, or, what comes to the same thing, of the several beneficial interests of *all* the beneficiaries, can put an end to a trust (say, for sale), and demand a conveyance of the legal estate from the trustees. It is, however, clear on principle that so long as any equity of redemption is in existence (that is to say, until sale or foreclosure) he could not. For while an equity of redemption subsists, the mortgagee is not the *sole* person beneficially interested in the property, and therefore cannot, under the rule above enunciated, assume absolute dominion over it. No doubt when he has obtained a decree of absolute foreclosure, he could put an end to the trust; and so, if he sold the entire beneficial interest of *all* the mortgagees, could the purchaser (*t*). Moreover, if the mortgage, or all the mortgages (as the case may be), contained powers authorising the mortgagee to stay, or agree with others in staying, the trust, he might, under such powers, do so; but nothing short of a most explicit power would enable him before foreclosure or sale to demand a conveyance of the legal estate.

The above view seems to be borne out by the cases of *Re Bell, Jeffery* v. *Sayles* (*u*) and *Hockey* v. *Western* (*x*), in which it was held that a mortgagee of a share in a trust fund, cannot demand to be paid the entire share of his mortgagor, but only his principal, interest, and costs (*u*); although the trustees might pay the whole share if they pleased (*x*).

(*r*) *Re White, White* v. *Edmond*, [1901] 1 Ch. 570; *Davidson* v. *Kimpton*, 18 Ch. D. 213; *Re Widdow's Trusts*, 11 Eq. 408; *Re Millner*, 14 *ib.* 245; *Re Jordan's Trusts*, [1903] 1 I. R. 119; *Re Thornhill, Thornhill* v. *Nixon*, [1904] W. N. 112; but *cf. Croxton* v. *May*, 9 Ch. D. 388.

(*s*) There is no reported decision as to this, but it is the well-known practice.

(*t*) Which he could do at one price (*Re Cooper and Allen*, 4 Ch. D. 802).

(*u*) [1896] 1 Ch. 1. (*x*) [1898] 1 Ch. 350.

Art. 56.—*Power of one of several Beneficiaries partially interested in a Special Trust.*

(1) The authority of one of several beneficiaries in a special trust, in general depends upon the terms of the trust as construed by the court, coupled with the powers conferred on equitable tenants for life by the Settled Land Acts, 1882—1890. But a beneficiary, who is *sui juris*, cannot be prohibited from assigning his or her interest, save only in the case of a married woman during coverture (*y*).

(2) The court has a discretion to order the trustees to give the actual possession of settled land to the person entitled for the time being to the net income, on such terms and conditions as the court may think fit (*z*).

Paragraph (1).

Equitable interest of beneficiary cannot be made inalienable except during coverture.

The interest of a beneficiary (save only in the case of a married woman during her coverture) cannot be made inalienable (*a*), except by means of a shifting clause giving it over, or practically giving it over, to some other person upon alienation (*b*); in which case such other person, having a contingent interest is also a beneficiary. For instance, a trust

(*y*) *Pybus* v. *Smith*, 3 B. C. C. 340 n; *Re Ellis*, 17 Eq. 499; *Horlock* v. *Horlock*, 2 De G. M. & G. 644; *Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Re Gaffee*, 1 M. & G. 547; *Buttanshaw* v. *Martin*, Johns. 89. Coverture means effective marriage, and ceases to exist not only by the death of the husband, but also by divorce (*Re Linzee's Settlement*, 23 Beav. 241), judicial separation, or the granting of a protection order (*Cooke* v. *Fuller*, 26 Beav. 99).

(*z*) *Re Bayot's Settlement*, *Bagot* v. *Kittoe*, [1894] 1 Ch. 177; *Re Richardson*, *Richardson* v. *Richardson*, [1900] 2 Ch. 778; *Re Hunt*, *Pollard* v. *Geake*, [1900] W. N. 65; *Re Money Kyrle*, *Money Kyrle* v. *Money Kyrle*, [1900] 2 Ch. 839.

(*a*) *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 R. & M. 395; *Brandon* v. *Robinson*, 18 Ves. 429; *Hood* v. *Oglander*, 34 Beav. 513. But *cf.* p. 53, *supra*.

(*b*) See *Oldham* v. *Oldham*, 3 Eq. 404; *Billson* v. *Crofts*, 15 Eq. 314; *Re Aylwin's Trusts*, 16 Eq. 585; *Ex parte Eyston*, 7 Ch. D. 145; and see *Re Porter*, *Coulson* v. *Capper*, [1892] 3 Ch. 481.

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to apply income for another's maintenance, entitles him to have the income paid to him or to his alienee, even although he be restrained from alienation; for no one in remainder is injured by it (*c*).

Otherwise where gift over on alienation.

Where, however, there is a trust to pay income to A. *until* he shall alien or become bankrupt, etc.; and, upon the happening of any of those events, a further trust to pay to him or apply for his benefit during the remainder of his life, the whole *or so much only* of such income as the trustees may in their discretion think fit, and subject thereto, the residue of such income (if any) is to be *paid to other persons;* then, as the trustees have an absolute discretion as to what part of the income they will apply for the benefit of the tenant for life, his alienees or creditors cannot force the trustees to pay them any part of the income (*d*). Moreover, it appears that although the trustees would not be justified in *paying* any part of the income to the life tenant (because it no longer belongs to him but to his alienees or creditors), they would nevertheless be justified in expending it for his benefit (*e*).

Restraint on alienation by married woman does not prevent her barring an entail.

Even where a married woman who is tenant in tail for her separate use is restrained from anticipation, she can bar the entail and turn her estate into a fee simple; for she does not thereby anticipate her interest, but only enlarges it (*f*).

PARAGRAPH (2).

How far equitable life tenant may claim actual possession.

Whatever the law may have been at one time, the court has, since the passing of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), exercised much more freely its undoubted discretion as to allowing an equitable life tenant to have actual possession (*g*). The principles on which the court now acts in such cases are stated in *Re Bagot's Settlement,*

(*c*) *Younghusband* v. *Gisborne*, 1 Coll. 400.
(*d*) *Re Bullock*, *Good* v. *Lickorish*, 64 L. T. 736; *cf. supra*, p. 297.
(*e*) *Re Bullock*, *supra*; and *cf. Re Coleman*, *Henry* v. *Strong*, 39 Ch. D. 443, and *Re Neil*, *Hemming* v. *Neil*, 62 L. T. 649. But see *Re Ashby*, *Ex parte Wreford*, [1892] 1 Q. B. 872, where VAUGHAN WILLIAMS, J., thought the bankrupt might have to account for sums paid to him.
(*f*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.
(*g*) *Re Richardson*, *Richardson* v. *Richardson*, *supra*.

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Bagot v. *Kittoe* (*h*). There CHITTY, J., said: "It is clear that Mrs. Bagot (the equitable life tenant) has no *right* to claim to be let into possession, and she can only claim to be let into possession through the exercise of the judicial discretion. . . . On the point of convenience, it is convenient that the lady and her husband, to the extent to which she may desire to obtain his assistance, should have the management of the property, the income of which she is entitled to receive; and that she should get that income with as little expense in the way of commission for collecting rents, employment of agents, and the like, as is practicable under the circumstances. . . . Therefore, if I were dealing with this case quite apart from the Settled Land Acts, I should consider it a proper exercise of my discretion to let the lady into possession. I am not disposed myself to say that the Settled Land Acts have abrogated the old cases. It really appears to me that the proper expression with regard to the Settled Land Acts, with reference to the doctrine which I am considering is, that the Settled Land Acts afford an additional ground for exercising the discretion favourably to the person who has conferred upon her or him, as tenant for life, by the Settled Land Acts, the extensive powers therein contained." The court therefore ordered that the tenant for life should be let into possession, upon giving certain undertakings in the form set forth in the case of *Re Wythes*, *West* v. *Wythes* (*i*). In *Re Newen*, *Newen* v. *Barnes* (*k*), KEKEWICH, J., appears to have considered that an equitable tenant for life is *entitled* to be let into possession on a proper case being made, but if and so far as he intended to hold that the matter was not discretionary, that view has been dissented from by STIRLING, J. (*l*).

(*h*) [1894] 1 Ch. 177.
(*i*) [1893] 2 Ch. 369.
(*k*) [1894] 2 Ch. 297. See also *Re Money Kyrle*, *Money Kyrle* v. *Money Kyrle*, [1900] 2 Ch. 839.
(*l*) *Re Hunt*, *Pollard* v. *Geake*, [1900] W. N. 65. As to an equitable tenant for life having the possession of the title deeds, see *Wheeler* v. *Tootell*, 51 W. R. 693.

CHAPTER VI.

THE DEATH, RETIREMENT, OR REMOVAL OF A TRUSTEE, AND THE EFFECT THEREOF IN RELATION TO THE OFFICE OF TRUSTEE.

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ART. 57.—*Survivorship of the Office and Estate.*

(1) Upon the death of a trustee, the office, as well as the estate, survives to the surviving trustees (*a*); and the survivors can carry out the trust and exercise all such powers as were given to the original trustees of dealing with the trust property (*b*), unless there be an intention to the contrary (*c*).

(*a*) *Warburton* v. *Sandys*, 14 Sim. 622; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 102.

(*b*) *Lane* v. *Debenham*, 11 Hare, 188: *Eyre* v. *Countess of Shaftesbury*, *supra*; *Re Cooke's Contract*, 4 Ch. D. 454; and as to settlements coming into operation since 1881, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22.

(*c*) *Foley* v. *Wontner*, 2 J. & W. 245; and see *Jacob* v. *Lucas*, 1 Beav. 436; *Re Smith, Eastwick* v. *Smith*, *supra*.

(2) An express power to appoint new trustees is not evidence of an intention to the contrary (*e*). Art. 57.

Surviving trustee may exercise all powers given to the original trustees as such.

This was always the law with regard to trusts as distinguished from mere bare powers (*f*). And now, by s. 22 of the Trustee Act, 1893 (re-enacting a repealed section of the Conveyancing and Law of Property Act, 1881), it is expressly enacted, that where, in the case of a trust created after December 31st, 1881, a power or trust is given to, or vested in, two or more trustees jointly, then, unless the contrary is expressed in the settlement (if any), the same may be exercised or performed by the survivor or survivors of them for the time being.

It would seem, however, that the statute only applies to powers which are incident to the office of trustee; and that it is in all cases a question of interpretation whether a discretionary power was intended to be incident to the office, or was a mere naked power given to the individuals who were also nominated trustees (*g*). *Primâ facie*, however, "every power given to trustees which enables them to deal with or affect the trust property, is given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being."

The mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude this *primâ facie* presumption, and little regard is now paid to such minute differences as those between such expressions as "my trustees," "my trustees, A. & B.," and "A. & B., my trustees." In short, the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language (*e*).

(*e*) *Per* FARWELL, J.: *Re Smith, Eastwick* v. *Smith*, [1904] 1 Ch., at p. 144.
(*f*) *Warburton* v. *Sandys, supra*; *Doe* v. *Godwin*, 1 D. & R. 259.
(*g*) *Cranford* v. *Forshaw*, [1891] 2 Ch. 261.

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ART. 58.—*Devolution of the Office and Estate on Death of the Survivor.*

(1) Upon the death of a last surviving trustee, since the 31st December, 1881, the trust property (with the sole exception of copyholds) devolves on his legal personal representative, and is incapable of being devised or bequeathed (*h*). Copyholds, however, devolve on the customary heir, unless (*semble*) they are expressly devised.

(2) The person on whom the trust property devolves, can exercise the powers and duties incident to the office (*i*) of trustee; unless it is to be collected from the settlement that the office was intended to be a personal one (*semble*).

PARAGRAPH (1).

Modern changes in the law as to the devolution of trust property.

Before 1874 the devolution of trust *estates* was regulated by the ordinary common law rules in relation to the devolution of property of a similar character, to which the trustee was beneficially entitled. Thus, trust personalty, or trust leaseholds, devolved upon the trustee's legal personal representatives; and trust real estate devolved upon his heir, *or passed to his devisee* if he made a will which either expressly or impliedly passed the legal estate in such lands.

This state of the law has, however, been altered from time to time in a fashion even more half-hearted and complex than is usual with the attempts of Parliament to amend our law of property. The net result of this legislation seems to be as follows:

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, as amended by s. 45 of the repealed Copyhold Act, 1887, now re-enacted in s. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46). It is conceived that a last surviving trustee cannot evade this prohibition by appointing "special executors" for the purpose of executing the trust (see *Re Parker*, [1894] 1 Ch. 707; *Rose* v. *Bartlett*, Cro. Car. 292; *Clough* v. *Dixon*, 10 Sim. 564); and this view seems to receive some support from the case of *Re Cohen's Executors and the London County Council*, [1902] 1 Ch. 187, where the general executors were held to be alone the personal representatives within the meaning of the Land Transfer Act, 1897.

(*i*) As to what powers are incident to the office, see *supra*, p. 305.

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(1) If a trustee of real estate died between August 7th, 1874, and January 1st, 1882, and was *not a bare trustee* (*k*), the property descended to his heir-at-law or customary heir, unless he devised it.

(2) If he died between August 7th, 1874, and January 1st, 1876, and *was a bare trustee*, the trust property *during that period* was vested in his personal representatives; but unless they conveyed it during that period, it shifted to his heir-at-law or customary heir on January 1st, 1876 (*l*).

(3) If he died between January 1st, 1876, and January 1st, 1882, and *was a bare trustee*, it devolved upon his personal representatives (*m*).

(4) If he died on or after January 1st, 1882, *and the property was freehold*, it devolved (and still would devolve) upon his personal representatives, quite irrespective of whether he was or was not a bare trustee, and whether he attempted to devise it or not (*n*).

(5) If he died between December 31st, 1881, and September 16th, 1887, and the trust property was of customary or copyhold tenure, it was during that period vested in his personal representatives; but unless they conveyed it during that period it shifted to his customary heir (or possibly to his devisee) on the latter date (*o*).

(*k*) The statutory expression "bare trustee" has given rise to considerable difference of opinion. The late Sir George Jessel thought it meant a trustee who had no beneficial interest in the property (*Morgan* v. *Swansea Board*, 9 Ch. D. 582). On the other hand, the late Vice-Chancellor Hall, in *Christie* v. *Ovington*, 1 Ch. D. 279; Bacon, V.-C., in *Re Docwra*, *Docwra* v. *Faith*, 29 Ch. D. 693; and Mr. Justice (now Lord Justice) Stirling, in *Re Cunningham and Frayling*, [1891] 2 Ch. 567, all considered that it meant a trustee with no duties except to convey the property to or by the direction of the *cestuis que* trust, and that a trustee who also took a beneficial interest (*e.g.*, as tenant in common) might be a bare trustee. It is considered that the latter view is the correct one.

(*l*) The extraordinary effect of s. 48 of 38 & 39 Vict. c. 87 (Land Transfer Act, 1875), repealing 37 & 38 Vict. c. 78 (Vendor and Purchaser Act, 1874), s. 5, as construed by Hall, V.-C., in *Christie* v. *Ovington*, 1 Ch. D. 279.

(*m*) 38 & 39 Vict. c. 87, s. 48.

(*n*) 44 & 45 Vict. c. 41 (Conveyancing and Law of Property Act, 1881), s. 30, and possibly also under the Land Transfer Act, 1897.

(*o*) Copyhold Act, 1887, s. 45, as construed in *Re Mills*, 37 Ch. D. 312; 40 *ib.* 14.

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(6) If he died on or after September 16th, 1887, and the trust property was of customary or copyhold tenure, it devolved (and still would devolve) on his customary heir (*p*), or (probably) his devisee.

Devise of trust estates.

As above stated, a sole or last surviving trustee who died on or before December 31st, 1881, was empowered to devise or bequeath the legal estate in the trust property of whatever tenure or nature (*q*); and a trustee of customary or copyhold lands can, it is apprehended, still do so. Trust estates capable of being devised pass under a general devise or bequest unless the will contains expressions authorising a narrower construction, or the disposition of the estate so devised or bequeathed be such as a testator would be unlikely to make of property not his own (*r*). Thus, where a testator subjected the property, passing under a general devise, to the payment of debts or legacies (*s*), or directed them to be sold (*t*), or devised them to persons as tenants in common (*u*), or to a numerous and unascertained class (*x*), or limited them in strict settlement, or in any other way which made it impossible to say the intention could be to give a dry trust estate, trust estates would not pass.

PARAGRAPH (2).

Party on whom trust estate devolves not necessarily able to execute the trust.

Whether the person on whom the trust property devolves can exercise the duties and powers confided to the trustees by the settlement, depends on the intention of the settlor as expressed in the settlement. Thus, where the settlor gave personal property to A. B. upon trust "that the said

(*p*) Copyhold Act, 1887, s. 45; *quære*, whether this is so if he be a bare trustee (40 Ch. D. 14).

(*q*) Constructive trust estates (as land agreed to be sold) passed under a devise of trust estates (*Lysaght* v. *Edwards*, 2 Ch. D. 499); but see Conveyancing, etc. Act, 1881, s. 4.

(*r*) *Braybroke* v. *Inskip*, 8 Ves. 417; *Ex parte Morgan*, 10 Ves. 101; *Langford* v. *Auger*, 4 Hare, 313.

(*s*) *Re Morley*, 10 Hare, 293; *Re Packman and Moss*, 1 Ch. D. 214; *Re Bellis's Trust*, 5 Ch. D. 504; but see *Re Brown and Sibley*, 3 Ch. D. 156, *contra*.

(*t*) *Re Morley*, *supra*.

(*u*) *Martin* v. *Laverton*, 9 Eq. 563.

(*x*) *Re Finney*, 3 Giff. 465; see also *Re Packman and Moss*, *supra*, and compare with *Re Brown and Sibley*, *supra*.

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A. B." do carry out certain specified objects, then upon the death of A. B., although the estate vested in his executor, the latter was unable to execute the trusts. For, as was said by Lord COTTENHAM in *Mortimer* v. *Ireland* (*y*), "whether the property is real or personal is no matter; for suppose a man appoints a trustee of real and personal estate *simpliciter*, adding nothing more, this cannot make his representative a trustee. . . . The property may vest in the representative, but that is quite another question from his being a trustee." However, his lordship's observation must not be taken literally. The representative would clearly be a trustee, not perhaps a trustee to administer the express trust, but at all events a passive or bare trustee of the property until new trustees were properly appointed, to whom he could hand it over.

Where representatives mentioned, *secus*.

But where freeholds are given to "A. and B. and their heirs upon trust for sale" (*z*), and *a fortiori* where they are vested in trustees, upon trust that "they or the survivor of them, or the heirs . . . of such survivor," shall perform the trust, or where personal property is vested in trustees upon trust that they or the survivor of them or the executors or administrators of the survivor shall perform the trust, then, upon the death of the survivor, the person on whom the trust *estate* devolves is able to execute the trust (*a*). I say the person on whom the estate devolves, because since December 31st, 1881, freehold trust estates devolve on the trustee's personal representatives, and not upon his heir; and notwithstanding that the settlement has conferred the trust upon the trustee *and his heirs*, the office will devolve on his personal representatives. For, by s. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted, that for this purpose "the personal representatives for the time being, of the deceased [trustee], shall be deemed in law

(*y*) 11 Jur. 721. But *quære*, see observations of JESSEL, M.R., in *Re Osborne and Rowlett*, 13 Ch. D., at p. 789.

(*z*) *Re Morton and Hallett*, 15 Ch. D. 143.

(*a*) *Re Burtt*, 1 Drew. 319; *Re Cunningham and Frayling*, [1891] 2 Ch. 567.

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his heirs and assigns, *within the meaning of all trusts and powers*" (*b*). This Act does not, however, extend to copyhold or customary estates (*c*).

Questionable whether devisee of trust estates could execute trust unless the settlement confided trust to trustee and his assigns.

As above stated, a trustee who died before January 1st, 1882, could devise (and where it consists of copyhold or customary land, can still devise (*d*)) the estate, unless expressly, or by necessary implication, prohibited from doing so. Whether, however, a valid devise of the estate would confer on the devisee the right of executing the trust is very questionable, unless the settlement expressly confided the trust to the trustee *or his assigns* (*e*). At one time, owing to the decision of SHADWELL, V.-C., in *Cooke* v. *Crawford* (*f*), it was considered that a devisee of a trust estate could only execute the trust if it was, by the settlement, confided to the trustee *and his assigns*—that otherwise, in fact, the trustee had no power to delegate the administration of trust to a devisee of the estate. But that doctrine, after being repeatedly questioned, was energetically dissented from by the late Sir GEORGE JESSEL, M.R., in the case of *Re Osborne and Rowlett* (*g*), where his lordship, after elaborately showing its absurdity, and how often it had been questioned and doubted, and reviewing the whole of the authorities, said: "Therefore, looking at this state of things, we must consider *Cooke* v. *Crawford* overruled." His lordship was of opinion that the person to execute the trust is the person who takes the estate, not by accident, so to speak (as in case of intestacy), but in accordance with the provisions of the instrument by which the trust was created. "There is a *trust annexed to the estate*, and when we find who is the person who takes the estate under the will [of the trustee], then we find who is the person to

(*b*) See *Re Pixton and Tong*, 46 W. R. 187, where the power was given to "the trustees for the time being" and it was held to be exercisable by the personal representative of the last survivor.

(*c*) Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45.

(*d*) Section 45 of Copyhold Act, 1887, *semble*.

(*e*) *Re Osborne and Rowlett*, 13 Ch. D. 774; dissenting from *Cooke* v. *Crawford*, 13 Sim. 91; and explaining *Hall* v. *May*, 3 K. & J. 585; *Tibby* v. *Wolstenholme*, 7 Beav. 425; *Saloway* v. *Strawbridge*, 1 K. & J. 371.

(*f*) *Supra*.

(*g*) *Supra*.

execute the trust." However, this decision of Sir GEORGE JESSEL'S was questioned by JAMES and BAGGALLAY L.JJ., in *Re Morton and Hallett* (*h*), where their lordships said, that as at present advised, they were not prepared to dissent from *Cooke* v. *Crawford*, or to concur in the opinion, expressed by Sir GEORGE JESSEL, that it had been overruled. The law, therefore, on the point, is in a far from satisfactory state. The point is not now of so much interest as it was formerly, inasmuch as, by s. 30 of the Conveyancing and Law of Property Act, 1881, trust estates (except those of copyhold and customary tenure, which were taken out of that statute by s. 45 of the Copyhold Act, 1887, now s. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46)), can no longer be devised; but the question may nevertheless, for some years, remain of importance in the investigation of titles.

ART. 59.—*Retirement or Removal of a Trustee.*

(1) A trustee can only retire—

(a) Under an express power;

(b) Under the statutory power conferred by the Trustee Act, 1893, either on the appointment of a new trustee in his place, or without such appointment if two at least will remain;

(c) By the consent of *all* the beneficiaries, which can only be obtained where all are *sui juris* (*i*);

(d) By order of the court (*j*).

(2) A trustee may be removed from his office—

(a) Under an express power;

(*h*) 15 Ch. D. 143.
(*i*) *Wilkinson* v. *Parry*, 4 Russ. 272; and see Art. 56, *supra*.
(*j*) *Re Greyson*, 34 Ch. D. 209; *Re Chetwynd*, *Scarisbrick* v. *Nerinson*, [1902] 1 Ch. 692.

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(b) Under the statutory power of appointing new trustees contained in section 10 of the Trustee Act, 1893, in cases where he remains out of the kingdom for more than twelve months consecutively (*k*), refuses or is unfit to act, or is incapable of acting;

(c) By the court (*l*), appointing a new trustee in his place at the instance of any of the beneficiaries, where he has behaved improperly (*m*), or is incapable of acting properly (*n*), or is a felon or dishonest misdemeanant, or a recent bankrupt (*o*), or is residing permanently, or for a long or indefinite period, abroad (*p*), or cannot be heard of (*q*), or where any other good reason exists (*r*).

PARAGRAPH (1).

Retirement under powers of appointing new trustees.

The most usual way in which a trustee retires, is under a power enabling some person or persons to appoint a new trustee in his place in (*inter alia*) the event of his desiring to retire. This mode of retiring necessitates the appointment of a new trustee in the place of the one retiring. No question, however, can ever arise as to the costs of such an appointment, inasmuch as *ex hypothesi* the power provides for the retirement of the trustee *if he so desires*. The costs, therefore, in such cases always fall on the estate and not on the retiring trustee. At one time such powers could only exist under the express provisions of the settlement; but for many years past such a power has been implied by statute

(*k*) See, *infra*, p. 321, note (*l*).

(*l*) Under s. 25 of the Trustee Act, 1893. Procedure is by originating summons even where the trustee resists (*Re Dawson*, 48 W. R. 73).

(*m*) *Millard* v. *Eyre*, 2 Ves. 94; *Palairet* v. *Carew*, 32 Beav. 564.

(*n*) *Buchanan* v. *Hamilton*, 5 Ves. 722; and *Re Lemann*, 22 Ch. D. 633; and *Re Phelps*, 31 Ch. D. 351, where trustees were incapable from old age and infirmity.

(*o*) *Re Adams' Trust*, 12 Ch. D. 634; *Re Barker*, 1 Ch. D. 43.

(*p*) *Buchanan* v. *Hamilton*, *supra*; *Re Bignold*, 7 Ch. App. 223; and *Re The Moravian Society*, 26 Beav. 101.

(*q*) *Re Harrison*, 22 L. J. Ch. 69.

(*r*) See *Assets, etc. Co.* v. *Trustees, etc. Corporation*, 65 L. J. Ch. 74.

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in all trust instruments irrespective of the date at which they first came into operation (*s*). These statutory powers will be discussed in the next article.

Retirement under statutory power without appointment of successor.

Before 1882 a trustee could only be discharged without the appointment of a successor in two cases, viz., (1) by the consent of all the beneficiaries (as to which see, *infra*), or (2) by order of the court which had (and still has) jurisdiction in a proper case (in an administration action or summons, but not in a summons under the Trustee Act (*t*)), to discharge one of two or more trustees without appointing a person to succeed him (*u*).

However, Parliament has now provided that "if, and so far as a contrary intention is not expressed" in the trust instrument, where there are *more than two* trustees, and one of them declares by deed that he is desirous of being discharged, and if his co-trustees and such other person (if any) as is empowered to appoint new trustees, by deed consent to his discharge and to the vesting in his co-trustees alone of the trust property, then he shall be discharged without any new trustee being appointed in his place (*x*).

Retirement by consent of all the beneficiaries.

The method of retirement by consent of all the beneficiaries is merely a corollary of Art. 55, *supra*, p. 295. The beneficiaries collectively being the sole owners of the property and able to put an end to the trust, can *a fortiori* permit the trustee to retire.

Retirement by order of the court.

Retirement by order of the court is now a comparatively rare method of retirement from a trust. It might arise where the trustee wishes to retire and either cannot procure a person to take his place, or being himself the appointing party, has a dispute with his beneficiaries in relation to the person to be appointed, or where the persons to appoint are out of the country or cannot be found (*y*). In such cases he would be justified in issuing an originating summons under Order 54B, r. 5, of the Rules of the Supreme Court for the

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10.
(*t*) *Re Chetwynd Scarisbrick* v. *Nevinson*, [1902] 1 Ch. 692.
(*u*) See *Re Stokes*, 13 Eq. 333.
(*x*) Trustee Act, 1893, s. 11.
(*y*) See *Re Humphry*, 1 Jur. (N.S.) 921; and *Re Somerset*, W. N. (1887), 122.

Art. 59. appointment of a new trustee in his place. No doubt it was formerly considered that a trustee could not retire from his trust without some good reason, and that "if the circumstances preventing his continuing to perform his duties arose from any act of his own, or anything relating to himself, he ought to pay the costs of the appointment of a new trustee" (*z*). But this was long before the statutory power, which enables a trustee to retire *if desirous of being discharged;* and it is conceived that now a trustee would not only be exempt from bearing the costs of an application to appoint a new trustee on his retirement (where it is difficult or impossible to appoint such a person under an express or the statutory power), but would also be entitled to his own costs (*a*); anyhow, it is the common practice (*b*).

PARAGRAPH (2).

The removal of a trustee is so mixed up with the appointment of new trustees that the reader is referred to the next article for further information on the subject.

ART. 60.—*Appointment of New Trustees* (*c*).

(1) New trustees of a settlement may be appointed—

(a) under an express power;

(b) under the statutory power conferred by s. 10 of the Trustee Act, 1893, unless a contrary intention is expressed in the settlement;

(*z*) *Forshaw* v. *Higginson*, 20 Beav. 485.

(*a*) See *Coventry* v. *Coventry*, 1 Keen, 758; *Greenwood* v. *Wakeford*, 1 Beav. 576; *Re Stokes*, 13 Eq. 333; and *Barker* v. *Peile*, 2 Dr. & S. 340.

(*b*) See *Re Chetwynd, Carisbrick* v. *Nevinson*, [1902] 1 Ch. 692.

(*c*) The appointment of a judicial trustee is treated of separately in Art. 69, *infra*.

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(c) by a person appointed for that purpose by the Lunacy Court, where the person having power to appoint is a lunatic or a person of unsound mind (*d*) ;

(d) by the Chancery Division of the High Court (or, where a trustee is a lunatic, by the Lunacy Court) on the application of any trustee or beneficiary (*e*), whenever it is found inexpedient, difficult, or impracticable to appoint a trustee without the assistance of the court ; and particularly where it is desirable to appoint a new trustee in place of one who is convicted of felony, or is a bankrupt (*f*), or is a lunatic or person of unsound mind. Where, however, there is a donee of a power of appointing new trustees able and willing to exercise it, the court has no power to appoint new trustees contrary to his wishes (*g*).

(2) On any appointment, unless expressly forbidden by the settlement, the number may be increased or diminished (*h*) ; but a retiring trustee will not be discharged by the appointment of a new trustee out of court, unless, on his retirement, there will be at least two trustees to

(*d*) *Re Shortridge*, [1895] 1 Ch. 278.

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 36, and Lunacy Act, 1890 (53 Vict. c. 5), s. 141. The court can charge the costs of such appointment and of vesting orders, on the trust estate (Trustee Act, 1893, s. 38).

(*f*) Trustee Act, 1893, s. 25.

(*g*) *Re Higginbottom*, [1892] 3 Ch. 132. But this does not relate to applications for the appointment of a judicial trustee under the Judicial Trustees Act, 1896, as to which see Art. 69, *infra*, and *Douglas* v. *Bolam*, [1900] 2 Ch. 749 ; nor, it is apprehended, to cases in which a judgment for general administration has been given, as to which see *infra*, p. 318.

(*h*) Where the appointment is made under an express power, see *Meinertzhagen* v. *Davis*, 1 Coll. 335 ; *Miller* v. *Priddon*, 1 De G. M. & G. 335 ; *Re Bathurst*, 2 S. & G. 169. Where it is made under the statutory power, see Trustee Act, 1893, s. 10.

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perform the trust (*i*), or unless only one was originally appointed. The court is generally indisposed to reduce the number, unless an administration action is pending, or the fund is about to be paid into court, or is immediately divisible (*k*).

(3) Every new trustee, both before and after the trust property is vested in him, has the same powers, authorities and discretions (incident to the office of trustee) (*l*), and may in all respects act as if he had been an original trustee.

(4) Any person who can hold property is capable of being appointed; but a person ought not to be appointed who is not *sui juris;* nor (except under very exceptional circumstances) one who resides out of the jurisdiction of the court: nor one who is a beneficiary, or husband of a beneficiary. The donee of a power of appointing new trustees ought not to appoint himself (*m*) without the sanction of the court (*n*).

PARAGRAPH (1) (a).

Appointment of new trustees under express power.

Express powers to appoint new trustees are construed somewhat strictly. Thus, where an express power t appoint new trustees is vested in "the surviving or continuing trustees or trustee, or the heirs, executors, or

(*i*) Trustee Act, 1893, s. 10. This seems to modify the decision FRY, J., in *West of England Bank* v. *Murch*, 23 Ch. D., at p. 146.

(*k*) *Re Gardiner*, 33 Ch. D. 590; *Davies* v. *Hodgson*, 32 *ib.* 225; *Re Lambe*, 28 *ib.* 77; *Re Harford*, 13 *ib.* 135; *Re Martyn*, 26 *ib.* 745; *Re Aston*, 23 *ib.* 217; but see *Re Fowler*, W. N. (1886), p. 183, and *Re Leon*, [1892] 1 Ch. 348, where the Lunacy Court made an order vesting the trust estate in three of the original four trustees, the fourth having become lunatic, and *Re Lees*, [1896] 2 Ch. 508; and *Re Fitzherbert*, W. N. (1898), 58, to same effect.

(*l*) As to the difference between powers incident to the office and powers confided to persons who are also trustees, see *per* FARWELL, J., in *Re Smith, Eastwick* v. *Smith*, [1904] 1 Ch., at p. 144.

(*m*) *Sheats* v. *Evans*, 42 Ch. D. 522; *Re Newen, Newen* v. *Barnes*, [1894] 2 Ch. 297.

(*n*) *Montefiore* v. *Guedalla*, [1903] 2 Ch. 723.

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administrators of the last surviving and continuing trustee," and all the trustees are desirous of retiring, they cannot do so by appointing new trustees in their place by one deed; but one must appoint a new trustee in the place of the first retiring trustee, and then the new trustee must appoint one in the place of the second retiring trustee, and so on (*o*). This singular instance of verbal subtlety all turns upon the idea, that trustees who are *about to retire cannot be said to be continuing* (*p*), but that if one retired first, the other would be a continuing trustee, although he might intend to retire the next day. If, in addition to the words "surviving and continuing," the words "or other trustee or trustees" had been added, the retiring trustees might have appointed new ones by the same deed (*o*).

"Continuing trustees or trustee."

So, again, the words "unfit and incapable" are very strictly construed. Thus, where a new trustee was to be appointed if a trustee became "incapable of acting," it was held that the bankruptcy of one of the trustees did not fulfil the condition, as it only rendered him *unfit* but not *incapable* (*q*). And so where the words were "unable to act," it was held that absence in China or Australia did not *disable* (*r*), although it clearly unfitted (*s*), a trustee for the office. But where the power was to arise in case a trustee should "be abroad," the fact of his having taken a five years' lease of a residence in Normandy, was held to be sufficient to enable the donee of the power to displace

"Unfit and incapable," or "unable to act," or going abroad.

(*o*) *Lord Camoys* v. *Best*, 19 Beav. 414; *Re Coates and Parsons*, 34 Ch. D. 370; *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333. This notion was strongly disapproved by BACON, V.-C., in *Re Glenny and Hartley*, 25 Ch. D. 611; but the Vice-Chancellor's *dicta* were equally strongly disapproved by PEARSON, J., in *Re Norris, Allen* v. *Norris*, *supra*, and by NORTH, J., in *Re Coates and Parsons*, *supra*.

(*p*) With regard to appointments made under the statutory power, this is not so, as the statute enacts that a continuing trustee shall include a refusing or retiring trustee, *if willing to act*, as donee of the power (Trustee Act, 1893, s. 10 (4)); but he is not a necessary party if unwilling to act (see *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333).

(*q*) *Turner* v. *Maule*, 15 Jur. 761; see *Re Watts*, 9 Hare, 106.

(*r*) *Withington* v. *Withington*, 16 Sim. 104; *Re Harrison*, 22 L. J. Ch. 69; but see *Re Bignold*, 7 Ch. App. 223.

(*s*) *Mennard* v. *Welford*, 1 Sm. & G. 426. A mere temporary absence abroad would not unfit a trustee for the office (*Re The Moravian Society*, 4 Jur. (N.S.) 703).

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him (*t*). So, it has been held that lunacy *disables* a trustee so as to bring a power into operation (*u*).

With regard to a trustee becoming *unfit* to act, bankruptcy (at all events where the trust property consists of money or other property capable of being misappropriated, and where the *cestuis que* trusts desire his removal (*x*)), and liquidation or composition (*x*), or conviction of a dishonest crime (*y*), are grounds for his removal *by the court* under s. 25 of the Trustee Act, 1893 (which has taken the place of s. 147 of the Bankruptcy Act, 1883). Whether, however, they would enable a donee of a power of appointing new trustees to displace him hostilely on the ground of *unfitness* seems questionable. Anyhow, it has been held that infancy is not *unfitness*, although an infant will be removed by the court (*z*). Lastly, with regard to *incapacity*, the word is strictly limited to incapacity of the trustee arising from some personal defect (*a*), as illness, lunacy (*b*), or, possibly, infancy.

Power personal and not incident to donee's estate.

Where the power is vested in a tenant for life, he may exercise it even after alienating his life estate (*c*). On the other hand, where a decree for administration by the court has been made, the donee of a power (whether express or statutory) can only appoint a new trustee under the supervision of the court, which will, however, accept his nominee, unless there be strong grounds for rejecting him (*d*).

PARAGRAPH (1) (b).

Appointment of new trustees under the statutory power.

If there be no express power, or even if there be one and the statutory power is not expressly negatived or

(*t*) *Re Lord Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288.
(*u*) *Re East*, 8 Ch. App. 735.
(*x*) See *Re Barker*, 1 Ch. D. 43; *Re Adams*, 12 Ch. D. 634.
(*y*) *Turner* v. *Maule*, 15 Jur. 761.
(*z*) *Re Tallatire*, W. N. (1885), p. 191.
(*a*) See *Re Watts*, 9 Hare, 106; *Turner* v. *Maule*, 15 Jur. 761; *Re Bignold*, 7 Ch. App. 223.
(*b*) *Re East*, 8 Ch. App. 735; *Re Blake*, W. N. (1887), p. 173.
(*c*) *Hardaker* v. *Moorhouse*, 26 Ch. D. 417.
(*d*) *Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134; *Re Hall, Hall* v. *Hall*, 33 W. R. 508.

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modified (*e*), and the express power is for some reason inapplicable to the state of circumstances that has arisen, new trustees may be appointed under the provisions of s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). In that case, it has been held that the persons to exercise the *statutory* power are *not* the persons nominated to exercise the *express* power, but the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee (*f*). This seems a rather narrow construction of the Act, the words of which are as follows:

(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust (*g*), or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee (*h*), may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2) On the appointment of a new trustee (*i*) for the whole or any part of trust property—

(a) the number of trustees may be increased; and

(*e*) *Cecil* v. *Langdon*, 28 Ch. D. 1; and *Re Wheeler and de Rochow*, [1896] 1 Ch. 315.

(*f*) *Re Wheeler and de Rochow*, *supra*.

(*g*) Where there was no express power but merely a declaration in a marriage settlement that the husband and wife and the survivor of them should have power to appoint new trustees, it was held that they could exercise this statutory power as the persons nominated for the purpose, etc. (*Re Walker and Hughes*, 24 Ch. D. 698).

(*h*) This includes the executor of a sole trustee (*Re Shafto*, 29 Ch. D. 247), but not the executor of a person who was nominated trustee of a will but died before the testator (*Nicholson* v. *Field*, [1893] 2 Ch. 511; but *cf. Re Ambler*, 59 L. T. 206).

(*i*) These words govern the whole sub-section, so that the number of trustees cannot be increased unless there be a vacancy to be filled up (*Re Greyson*, 34 Ch. D. 209; *Re Driver*, 19 Eq. 352).

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(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees ; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part ; and

(c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed ; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust ; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This section applies to trusts created either before or after the commencement of this Act.

This section (which is a re-enactment of s. 31 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41)) has put an end to many questions which formerly presented much difficulty. For instance, where a trustee had gone abroad, it was always a source of trouble to

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determine what amount of absence constituted a disability or unfitness for his continuing a trustee (*k*). Now, however, twelve months is specified as the period. It will be seen that the power is exercisable in six cases, viz: (1) on the death of a trustee; (2) where he remains out of the kingdom for twelve months; (3) where he desires to be discharged; (4) where he refuses to act; (5) where he is unfit to act, and (6) where he is incapable of acting.

Trustee desiring to be discharged.

The first two cases require no comment, except that the twelve months must be unbroken (*l*). With regard to the third it is conceived that it is clearly applicable to the case of an executor who, having paid debts, funeral, and testamentary expenses, has assented to a settled legacy where the testator has not appointed trustees to administer it. In such cases where the executor has assented to the legacy he becomes *functus officio quâ* executor, and thenceforth holds the legacy as trustee (*m*); and (it is submitted) can, like any other trustee, retire, and appoint a new one in his place under the section now under consideration (*n*). Whether, however, the section is equally applicable where the legacy is not settled (*e.g.*, a legacy to an infant for which the executor cannot get a receipt), or where an administrator holds a share of residue, seems much more doubtful. The present writer (apart from authority) would have thought that the retention of a legacy by an executor or administrator until he can get a receipt, is in his legal character of personal representative, and that no trusts having been declared with regard to the legacy, there can be no implication that he has changed his legal character of executor or administrator for that of a trustee responsible only in equity (*o*). At the same time, having regard to the judgment of NORTH, J., in *Re Smith, Henderson-Roe* v. *Hitchins* (*m*),

(*k*) See *Re Harrison*, 22 L. J. Ch. 69; *Re Bignold*, 7 Ch. App. 223.

(*l*) *Re Walker, Summers* v. *Barrow*, [1901] 1 Ch. 259.

(*m*) See *Re Smith, Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302; *Re Earl of Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288; *Re Willey*, W. N. (1890), 1.

(*n*) *Ib.*; and see also *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778; and comments thereon of KEKEWICH, J., in *Eaton* v. *Daines*, W. N. (1894), 32.

(*o*) See *Eaton* v. *Daines*, *supra*.

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and the definition of trustee in s. 50 of the Trustee Act, 1893, the language of s. 10 seems wide enough to cover such cases. But the fact that s. 25 expressly forbids the court to appoint an executor or administrator, seems to show that Parliament did not intend s. 10 to be applicable where legacies remain unpaid, or personal estate of an intestate remained undistributed. The point seems, therefore, to be too doubtful to enable practitioners to advise personal representatives to appoint trustees in their stead under s. 10.

Refusal to act as trustee.

With regard to the fourth case, viz., refusal to act, it is apprehended that it clearly extends to the case of a disclaimer—*i.e.*, to a case where the person nominated trustee has never accepted the office (*p*).

Unfitness or incapacity.

With regard to a trustee becoming unfit to act or incapable of acting, the reader is referred to p. 317, *supra*.

Where donees of express power differ, the statutory power is available.

Where there are joint donees of a power of appointment named in the settlement, and they differ as to the person to be appointed, they will be deemed to be "unable or unwilling" to appoint, so as to vest the statutory power in the surviving or continuing trustees (*q*). Lastly, it may be observed that the statutory power is not imperative, and imposes no obligation on the donee of the power to appoint new trustees (*r*); and by s. 47 it applies to trustees for purposes of the Settled Land Acts.

PARAGRAPH (1) (c).

Power vested in or only exercisable with consent of a lunatic.

Where the *power of appointing* new trustees is vested in a person who is lawfully detained as a lunatic, or where the power is only exercisable with the consent of that person, the proper course is to apply to the Masters in Lunacy by summons to appoint a person *to exercise the power* or to give the required consent on behalf of the lunatic (*s*). The master who makes the order has also jurisdiction, under s. 129 of the Lunacy Act, 1890 (53 Vict.

(*p*) See *Re Hadley*, 5 De G. & Sm. 67.
(*q*) *Re Sheppard*, W. N. (1888), p. 234.
(*r*) *Peacock* v. *Colling*, 33 W. R. 528; *Re Knight*, 26 Ch. D. 82.
(*s*) *Re Fuller*, [1900] 2 Ch. 551; *Re Shortridge*, [1895] 1 Ch. 278; and s. 128 of the Lunacy Act, 1890.

c. 5), to make an order vesting the property in the new trustees when appointed (*t*). Art. 60.

Advantage of this procedure.

Thus, where a sole surviving trustee was a person lawfully detained in an asylum and was the person to exercise the statutory power of appointing new trustees, it was held that the master had jurisdiction to appoint a person to exercise the power by appointing two new trustees, and to make an order vesting the trust property in the trustees so appointed. The advantage of this simple procedure appears to be. that although the court has no jurisdiction to *appoint new trustees itself*, and make a vesting order under ss. 135 to 142 of the Lunacy Act in substitution for a lunatic *not so found* if the alleged lunatic opposes the application on the ground that he is not of unsound mind (a fact which can only then be determined either by inquisition or in an action in the Chancery Division for his removal); yet under this procedure the mere fact that the party is lawfully detained as a lunatic is sufficient to give the court jurisdiction. The summons in such matters ought merely to be entitled "in the matter of A.B." (the lunatic). As will be seen later on (p. 339, *infra*), where the lunatic is not the appointing party, this simple method of vesting the property in the new trustees is not available.

Paragraph (1) (d).

Appointment of new trustees by the court.

The power of the High Court to appoint new trustees is now contained in the Trustee Act, 1893 (56 & 57 Vict. c. 53). The Lunacy Court has, however, concurrent jurisdiction to appoint a new trustee where an existing one is a lunatic, whether so found or not (*u*); and, as the High Court has no jurisdiction to make a vesting order as to property vested in a lunatic trustee (whether so found or not), unless he be an infant, the proper course, where a vesting order is required, is to apply to the Lunacy Court,

(*t*) *Re Fuller*, *supra*: but not where the new trustees are appointed in any other way, in which case application for a vesting order must be made to the court, as to which, see *Re Langdale*, [1901] 1 Ch. 3, and *infra*, p. 339.

(*u*) Lunacy Act, 1890, ss. 141—143.

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and not to the High Court (*v*). The following are the statutes relating to the appointment of trustees by the High Court and Lunacy Court respectively:

Statutory power of High Court.

By s. 25 of the Trustee Act, 1893, it is enacted that—

(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt (*w*).

(2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section shall give power to appoint an executor or administrator.

And by s. 37 of the same Act, it is enacted that—

Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Statutory power of Lunacy Court.

Section 141 of the Lunacy Act, 1890 (53 Vict. c. 5), is as follows:

In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

(*v*) *Re M.*, [1899] 1 Ch. 79.

(*w*) The procedure by originating summons is applicable even where the incriminated trustee refuses to retire (*Re Danson*, 48 W. R. 73).

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Sections 135 and 136 in effect provide that the judge may make vesting orders whenever a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage, or is solely or jointly entitled to any stock or chose in action upon trust or by way of mortgage. The application under these sections is now made by summons (*x*).

Examples of cases in which application to court is proper.

It will be perceived that application should only be made to the court to appoint new trustees in cases where, for some reason or other, it is difficult, inexpedient, or impracticable to appoint them under an express power, or the statutory power; and if such an application be made unnecessarily, it will be dismissed with costs.

No donee of the power, or none capable of acting.

However, there are many cases in which it is inexpedient or impracticable to appoint new trustees out of court. Thus, if a last surviving or a sole trustee died intestate, and left no personal estate, so that no one could take out letters of administration to him, and no one was named in the settlement to appoint new trustees, it was formerly necessary to apply to the High Court. But probably this is no longer so, as the Land Transfer Act, 1897 (60 & 61 Vict. c. 65, s. 1 (3)), enables letters of administration to be granted in respect of real estate alone. And so where a trustee has become, through old age and infirmity, incapable of acting in the trust, the court has exercised its jurisdiction of appointing new trustees (*y*).

Appointment by court where no original trustees.

Again, where, by inadvertence, or by reason of disclaimer, death or otherwise, there never were any original trustees of the settlement, and no express power of appointing any, the court will appoint some (*z*).

Appointment by court where trustee an infant.

So, where a trustee is an infant, the court will appoint another in his place; but this will be done without prejudice to any application by the infant, on coming of age, to be restored (*a*).

(*x*) Rule 17, Lunacy Rules, 1892, as amended Nov. 1900.
(*y*) *Re Lemann*, 22 Ch. D. 633; *Re Phelps*, 31 Ch. D. 351.
(*z*) *Dodkin* v. *Brunt*, 6 Eq. 580; *D'Adhemar* v. *Bertrand*, 35 Beav. 19; *Re Smirthwaite*, 11 Eq. 251; *Re Davis*, 12 Eq. 214; *Re Moore*, *McAlpine* v. *Moore*, 21 Ch. D. 778; *Re Williams*, 36 Ch. D. 231.
(*a*) *Re Shelmerdine*, 33 L. J. Ch. 474.

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Appointment by court in cases of doubt.

So, if there be a doubt whether the statutory (or an express) power applies, the court will solve it by appointing new trustees itself (*b*).

Appointment by court where the donees of power cannot agree.

So it has been held that where the power of appointing new trustees is given to a husband and wife jointly, and they are judicially separated (*c*), or where the donees of the power cannot agree upon the choice of the new trustees, the court will appoint. But see as to this, *supra*, p. 322.

Where last surviving trustee has left no representative.

Again, where a last surviving trustee has died, and there is no personal representative of him, the court cannot make a vesting order except in connection with an order for the appointment of new trustees. Consequently, that is a case where "it is inexpedient" to appoint without the assistance of the court (*d*).

Appointment by court where trustee a felon or bankrupt.

Where a trustee is a felon, or a bankrupt, and refuses to join in the appointment of a new trustee in his place, the court can and will remove him, and appoint another person if the beneficiaries desire it (*e*); and a similar observation applies to a trustee who has become a lunatic (*f*), or has gone to reside permanently abroad (*g*), or has absconded.

Summary procedure only applicable where trust is clear.

The regular procedure for the appointment of new trustees by the court under the statutory jurisdiction, is by originating summons (*h*); but it would seem that where the trust is not clear on the face of written documents (*e.g.*, where a conveyance is taken in the name of some other person than the real purchaser (*i*)), the court first requires the trust to be established to its satisfaction, and that can only be done by an action.

(*b*) *Re Woodgate*, 5 W. R. 448.

(*c*) *Re Somerset*, W. N. (1887), p. 122.

(*d*) See note (*g*), p. 337, *infra*.

(*e*) *Coombes* v. *Brookes*, 12 Eq. 61; *Re Adams*, 12 Ch. D. 634; *Re Foster*, 55 L. T. 479; *Re Dawson*, 48 W. R. 73.

(*f*) If a vesting order is also required the application must be made to the Lunacy Court (*Re M.*, [1899] 1 Ch. 79), unless the lunatic is out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29).

(*g*) *Re Bignold*, 7 Ch. App. 223. As to the length of absence abroad, see *Hutchinson* v. *Stephens*, 5 Sim. 498.

(*h*) R. S. C. Order 54. Even where the trustee whom it is desired to displace opposes (*Re Dawson*, *supra*).

(*i*) *Re Martin's Trusts*, W. N. (1886), p. 183; and see also *Re Carpenter*, Kay, 418; and *Re Weeding*, 4 Jur. (N.S.) 707.

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Court will not re-appoint existing trustees.

It was at one time thought that where there were properly appointed trustees in existence, and it was impossible otherwise to vest the trust property in them, or where it was desirable to remove one of several trustees and impossible to get anyone to serve in his place, the court could, in the one case, re-appoint all the existing trustees and order the trust property to vest in them; or, in the other case, re-appoint the continuing trustees in the place of themselves and the trustee whom it was desired to remove. However, it is now well settled that the court has no jurisdiction to re-appoint existing trustees (*k*).

Court can increase the number at any time.

Although the statutory power of increasing the number of trustees on an appointment out of court, can only be exercised when there is a vacancy to be filled up, yet there is no such limitation on the power of the court to increase the number of trustees at any time if it should be deemed expedient (*l*).

Appointing person to perform the duties incident to office of executor.

Although s. 25 (3) of the Trustee Act, 1893 (56 & 57 Vict. c. 53), expressly prohibits the court from appointing an executor or administrator; yet where a testator has not appointed a trustee of trust legacies, (and, consequently, the trusteeship is incident to the office of executor,) the court has jurisdiction, the debts, funeral, and testamentary expenses having been paid and the executor having assented to the legacy, to appoint someone to perform those fiduciary duties in his place (*m*).

PARAGRAPH (2).

General principles as to persons proper to be appointed new trustees.

In selecting persons to be new trustees, the court acts upon the following principles, and it is apprehended that donees of powers *ought* to be guided by the same

(*k*) *Re Vicat*, 33 Ch. D. 103; *Re Dewhirst*, *ib.* 416; *Re Gardner*, *ib.* 590; *Re Batho*, 39 *ib.* 189; overruling *Re Rathbone*, 2 Ch. D. 483; *Re Dalgleish*, 4 *ib.* 143; and *Re Crowe* (No. 2), 14 *ib.* 610.

(*l*) *Re Greyson*, 34 Ch. D. 209, and see *Re Driver*, 19 Eq. 352.

(*m*) *Re Moore*, *McAlpine* v. *Moore*, 21 Ch. D. 778; *Eaton* v. *Daines*, W. N. (1894) 32; and *Re Willey*, W. N. (1890) 1; *Re Lord Stamford*, *Payne* v. *Stamford*, [1896] 1 Ch. 288; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50 (interpretation of "trust" and "trustee.") And see also *supra*, p. 321.

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considerations, although, no doubt, their appointments would not be invalidated if they failed to observe them.

First, regard will be paid to the wishes of the settlor as expressed in, or plainly deduced from the settlement.

Secondly, a person will not be appointed with a view to the interest of some of the beneficiaries in opposition to the interest of others.

Thirdly, regard will be had to the question whether the appointment will promote or impede the execution of the trust; but (*semble*) the mere fact of a continuing trustee refusing to act with the proposed new trustee, will not be sufficient to induce the court to refrain from appointing him (*n*).

Persons proper to be appointed new trustees.

With reference to the question as to the personal fitness of a proposed new trustee, an infant can, no doubt, be appointed an original trustee, but it would not be a wise appointment; and a retiring trustee most certainly ought not to concur in the appointment of an infant to replace him. For an infant cannot properly carry out a special trust during his minority, and a person who should appoint one might not improbably find that he would have to pay the costs of an action instituted for the purpose of removing the infant (*o*), as he cannot be supplanted as "unfit" by the appointment of a new trustee under s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (*p*).

Appointment of tenant for life to be trustee.

A tenant for life has been held to be a not improper appointment (*q*); but it certainly is not an advisable one. For one of the main objects of a trustee is to protect the remainderman against the tenant for life.

Appointment of remainderman.

It has been held (*r*) that a remainderman is not a person whom *the court* will appoint, at all events where there is an infant tenant for life. For the interest of a person entitled in remainder is somewhat opposed to that of a tenant for

(*n*) *Re Tempest*, 1 Ch. App. 485.
(*o*) See *Raikes* v. *Raikes*, 32 Beav. 403.
(*p*) *Re Tallatire*, W. N. (1885), p. 191.
(*q*) *Forster* v. *Abraham*, 17 Eq. 351.
(*r*) *Re Paine*, 28 Ch. D. 725.

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life; and it would be for his advantage to lay out trust money in making improvements on the property, instead of making accumulations for the benefit of the tenant for life. Of course, however, such an objection would be inapplicable where a tenant for life is *sui juris* and consents to the appointment.

Appointment of solicitor to the trust.

The solicitor to the trust is not a proper person to be appointed a new trustee. Such an appointment would not, however, be bad, so as to invalidate the acts of the trustee so appointed; but the court would not make, or sanction, such an appointment (*s*).

Husband of beneficiary appointed trustee.

The husband of a beneficiary entitled for her separate use ought not to be appointed; for his interests are entirely in conflict with those of his wife. The court will never make such an appointment unless it is impossible to get another person, and even then will generally do so only upon condition that a direction is inserted in the order, stipulating that, upon his becoming sole trustee, there shall be another appointed (*t*). In one case (*u*), KAY, J., appointed two persons, one of whom was a beneficiary, and the other the husband of a beneficiary, upon their both undertaking, if either were left sole trustee, to endeavour to obtain the appointment of a new trustee.

Person out of jurisdiction appointed trustee.

It is not proper to appoint a trustee who resides out of the jurisdiction, save under very exceptional circumstances (*x*). But where all the beneficiaries were resident in Australia, the court appointed a person resident there (*y*).

Appointing alien trustee.

An alien may, since the passing of the statute 33 & 34 Vict. c. 14, hold real estate. He may therefore, it is

(*s*) *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333, and *Re Lord Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288. The same rule is equally applicable to appointments of trustees for purposes of the Settled Land Acts, *Re Kemp*, 24 Ch. D. 485; *Re Spencer*, [1903] 1 Ch. 75.

(*t*) *Re Parrott*, 30 W. R. 97.

(*u*) *Re Lightbody*, 33 W. R. 452.

(*x*) *Re Curtis*, 5 I. R. Eq. 429; but *cf. Re De Quetteville, De Quetteville* v. *De Quetteville*, 19 T. L. R. 383.

(*y*) *Re Freeman*, 37 Ch. D. 148; *Re Lidiard*, 14 Ch. D. 310; *Re Cunard*, 27 W. R. 52; *Re Austen*, 38 L. T. 601; *Re Hill*, W. N. (1874), p. 228.

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apprehended, be either a settlor or a trustee; although the court usually objects to appoint an alien unless he be permanently domiciled in England.

Appointment of married woman.

A married woman may undoubtedly be a trustee (*z*), but she is not a desirable person for the office, at all events where real estate is concerned. No doubt she can exercise powers collateral, or in gross, or appendant (*a*); but she can only execute a trust to sell real estate (or *semble* chattels real, unaccompanied by a power of appointment), with her husband's consent and joinder. For the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), does not apply to land vested in a married woman as trustee (*b*), and consequently she can only convey it with the joinder of her husband, and by an acknowledged deed. And it is apprehended, that even where a *power* is vested in her to sell, she would not be capable of entering into a binding *contract* to execute the power, as it is no question affecting her separate estate (*c*). Moreover, the necessity of getting her husband's joinder (which he might possibly withhold), the expense of acknowledgments, and the probability that the trust will be really executed by her husband, and not by herself, makes a married woman a far from desirable trustee in most cases. Some judges have even objected to appoint spinsters as trustees (*d*); probably on account of their objectionable habit of marrying persons whose fiduciary capacity the court cannot foresee.

Appointment of a trust company.

Lastly, the court will not appoint (nor ought the donees of a power to appoint) an incorporated company formed for the purpose of acting as a trustee (*e*).

(*z*) *Smith* v. *Smith*, 21 Beav. 385.

(*a*) *Godolphin* v. *Godolphin*, 1 Ves. sen. 21.

(*b*) *Re Harkness and Allsopp*, [1896] 2 Ch. 358. A Bill is, however, now before Parliament with the object of reversing this disability.

(*c*) *Avery* v. *Griffin*, 6 Eq. 607.

(*d*) See *Re Peake*, [1894] 3 Ch. 520, where NORTH, J., at first refused to appoint two ladies, one a widow and one a spinster, to sell land under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), but subsequently relented. In a subsequent case, however (*Re Newen*, *Newen* v. *Barnes*, [1894] 2 Ch. 297), KEKEWICH, J., took a more favourable view of the business capabilities of the sex.

(*e*) *Re Broglen*, *Billing* v. *Broglen*, W. N. (1888), p. 238.

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Art. 61.—*Vesting of Trust Property in new Trustees.*

(1) On a change in the trusteeship, out of court, the trust property should be vested jointly in the persons who are for the future to be the trustees (*f*). This may be done :

(a) by the ordinary modes of transferring property ;

(b) since the 31st December, 1881, by a vesting declaration in the deed by which a trustee is appointed (or by which one retires) under s. 12 of the Trustee Act, 1893 ; but this section does not apply to legal estates in copyhold or customary lands, lands in mortgage, or stocks or shares transferable in books of a company or corporation ;

(c) where neither of the foregoing means are available, application may be made, to a judge of the Chancery Division of the High Court of Justice (or, in case of lunacy or unsoundness of mind of a trustee who is being displaced, to the Lunacy Court) for a vesting order (*g*).

(2) On the appointment of a new trustee by the court, a vesting order will be made, vesting the trust property in the new trustee or trustees, either alone, or jointly with the continuing trustee or trustees, as the case may require.

Paragraph (1) (b).

Vesting declarations on appointments out of court.

Before the year 1882, difficulties frequently arose in relation to the vesting of the trust property on the appointment of new trustees, owing to the fact that the legal estate

(*f*) Trustee Act, 1893, s. 10 (2) (d), and s. 11 (2).

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 32, 34, 35, and 36 ; and as to lunatic trustees, or trustees of unsound mind, Lunacy Act,

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could only be transferred *by* the persons in whom it was legally vested, or by a vesting order of the court. For instance, a trustee might leave the country permanently, or become a lunatic, or (being a sole trustee) die intestate and without any heir. The legal estate, being vested in him, could only be got out of him by a duly executed conveyance or assignment, or by an order of the court; and as the former could not be obtained, the latter became a matter of necessity. However, by s. 34 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), re-enacted by s. 12 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), this difficulty was to a great extent obviated, although not completely; for it does not apply to all kinds of property, so that applications to the court for vesting orders will still have to be made in many cases.

The section in question is in the following words, viz.:

(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration *by the appointor* to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned *by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees*, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of

1890 (53 Vict. c. 5), ss. 133—143. As to simpler procedure, where the lunatic is the person who has power to appoint the new trustee, see *supra*, p. 322. The court cannot, however, under this Act make a vesting order where the legal estate in the entirety, and the beneficial interest in part of land, is vested in the Crown. In such a case the proper procedure is to issue a summons asking for a sale under s. 5 of the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71) (*Re Pratt*, 55 L. T. 313).

mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

It will be perceived that the declaration must be contained in *the deed by which the new trustee is appointed*. With regard to the property which does not pass by a vesting declaration, copyholds must be vested by surrender and admittance in the usual way. Mortgages are invariably transferred without disclosing the trust, so as to keep it off the face of the mortgagor's title. Stocks, shares, etc., are transferred by deed of transfer, duly registered with the bank or company.

PARAGRAPHS (1) (c), (2).

Vesting orders made by the Chancery Division of the court (*h*).

The jurisdiction of the Chancery Division to make orders vesting trust property in the trustees for the time being of a settlement, is codified in ss. 26, 32, 34, 35, and 36 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). Similar powers are conferred on the Lunacy Court where a trustee has become lunatic or of unsound mind, by ss. 129, 135 and 136 of the Lunacy Act, 1890 (53 Vict. c. 5) (*i*). The sections of the Trustee Act, 1893, above referred to, are as follows:

Trustee Act, 1893, s. 26.

26. In any of the following cases, namely:

(i.) Where the High Court appoints or has appointed a new trustee (*k*); and

(*h*) By s. 41 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), this jurisdiction extends to land and personal estate in his Majesty's dominions, except Scotland. See *Re Hewitt*, 6 W. R. 537, and *Re Lamotte*, 4 Ch. D. 325. Similar powers were given to the Irish courts by the Trustees Act, 1893, Amendment Act, 1894.

(*i*) See *infra*, p. 339.

(*k*) It is apprehended that the intention of the legislature was that *each* of these paragraphs should stand alone, and that the circumstances

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(ii.) Where a trustee (*l*) entitled to or possessed of any land (*m*), or entitled to a contingent right therein, either solely or jointly (*n*) with any other person,—

(a) is an infant (*o*), or

(b) is out of the jurisdiction of the High Court (*p*), or

(c) cannot be found ; and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead ; and

(v.) Where there is no heir or personal representative to a trustee (*q*) who was entitled to or possessed of land and

enumerated in *each* should give jurisdiction to make a vesting order. That was so under the Trustee Act, 1850, and the court made vesting orders on the appointment of new trustees, even though there was no incapacity in the person in whom the estate was vested to convey it to the new trustees (*Re Manning*, Kay, App. xxviii. ; *Hancox* v. *Spittle*, 3 Sm. & G. 478). However, in the new section, the language is not very happy, as, if we read paragraph (i.), and omit paragraphs (ii.) to (vi.), there is nothing to show to what the words "the land," which is to be vested, refer.

(*l*) The word "trustee" includes a constructive trustee, *e.g.*, the heir of a testator whose trustees have predeceased him or disclaimed (*Wilks* v. *Groom*, 6 De G. M. & G. 205 ; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50.

(*m*) It is apprehended that "land" includes leaseholds ; for it was stated in the memorandum annexed to the bill that the words "entitled to or possessed of" were substituted for the words "seised or possessed of" (which were used in the Act of 1850), for the express purpose of including leaseholds. See also s. 50, where land is defined as including land of any tenure. The matter might, however, with advantage, have been made plainer. Under the old Act there was no power to vest leaseholds, except on the appointment of new trustees by the court. The corresponding section of the Lunacy Act, 1890, contains the old words "seised or possessed," and consequently it seems questionable whether the lunacy judges have power to make vesting orders of leaseholds. As to whether the court has jurisdiction to vest the right to the title deeds, see *De Sayres* v. *De Sayres*, 87 L. T. Notes, 93.

(*n*) The word "jointly" is not to be construed strictly. It includes coparceners (*Re Greenwood*, 27 Ch. D. 359).

(*o*) Even if the infant be also a lunatic, this gives the Chancery Division jurisdiction. See Lunacy Act, 1890 (53 Vict. c. 5), s. 143.

(*p*) A merely temporary absence (*e.g.*, that of a sailor on a voyage) is not sufficient (*Hutchinson* v. *Stephens*, 5 Sim. 498). On the other hand, where a person out of the jurisdiction is a lunatic, this paragraph gives to the Chancery Division a jurisdiction which in the case of a lunatic in England would be only exercisable by the lunacy judges (*Re Gardner*, 10 Ch. D. 29).

(*q*) See *Re Williams*, 56 L. T. 884 ; *Re Rackstraw*, 52 *ib.* 612 ; *Re Pelling*, 26 Ch. D. 432.

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has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead ; and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully (*r*) refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement ;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate (*s*) as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees ; and

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

Trustee Act, 1893, s. 32.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before

(*r*) A trustee's conduct in not conveying cannot be considered wilful, if the title of the applicant to call for a conveyance is subject to a dispute which leads the trustee to entertain a *bonâ fide* doubt as to his title (*Re Mills*, 40 Ch. D. 14). But if he has acted unreasonably he may have to pay the costs (*Re Knox*, [1895] 1 Ch. 538; affirmed, [1895] 2 Ch. 483). The petition must not be even *presented* until the twenty-eight days have elapsed (*Re Knox*, *supra*).

(*s*) Under these words the court can vest the estate of a tenant in tail in a purchaser in fee simple, but it usually appoints some person to execute a regular disentailing assurance under s. 33. See *Caswell* v. *Sheen*, W. N. (1893), 187 ; and *Powell* v. *Matthews*, 1 Jur. (N.S.) 973 ; *Mason* v. *Mason*, W. N. (1878), 41.

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the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Trustee Act, 1893, ss. 33-35.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

34.—(1) Where an order vesting copyhold land (*t*) in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

35.—(1) In any of the following cases, namely:

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock (*u*) or to a chose in action—

(a) is an infant, or

(*t*) As to what fines are payable, see *Paterson* v. *Paterson*, 2 Eq. 31; and *Hall* v. *Bromley*, 35 Ch. D. 642.

(*u*) Stock includes fully paid-up shares, and any fund, annuity, or security transferable in books kept by any company or society, or by

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(b) is out of the jurisdiction of the High Court (*x*), or

(c) cannot be found ; or

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him ; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead (*y*),

the High Court may make an order vesting the right to transfer (*z*) or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the court may appoint :

instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein (s. 50). Under the repealed Act of 1850, stock includes shares *not* fully paid-up (*Re New Zealand, etc. Co.*, [1893] 1 Ch. 403) ; but query whether the above definition would admit of such a construction being given to the new Act. As to orders under Lunacy Act, 1890, see *Re Greyson*, [1893] 3 Ch. 233.

(*x*) See note (*y*), *supra*, p. 326. Where one trustee was a lunatic and the other out of the jurisdiction, and two new ones had been appointed under a power, the Court of Appeal, acting in lunacy, vested the stock in the one out of the jurisdiction, and then, acting under their Chancery jurisdiction "it appearing that he was out of the jurisdiction," vested it in the new trustees (*Re Batho*, 39 Ch. D. 189).

(*y*) It will be perceived that, except where the court is appointing new trustees, it has no jurisdiction to make a vesting order of stock where the last surviving or only trustee has died without leaving a legal personal representative. At one time (as also in the case of leaseholds) the court used to get over this difficulty by *reappointing* trustees already appointed out of court, and by making a vesting order consequential on such reappointment (*Re Rathbone*, 2 Ch. D. 483 ; *Re Dalgleish*, 4 Ch. D. 143 ; *Re Crowe* (No. 2), 14 Ch. D. 610). However, it is now well settled that the court has no jurisdiction to reappoint trustees who are already validly appointed (*Re Vicat*, 33 Ch. D. 103 ; *Re Deckhirst*, *ib.* 416 ; *Re Gardner*, *ib.* 590 ; *Re Batho*, 39 Ch. D. 189). Consequently, the former device is no longer available, and a legal personal representative has to be constituted in such cases. This difficulty may be avoided by asking the court to appoint new trustees, on the ground that it is inexpedient to appoint them out of court.

(*z*) Where the trust funds are invested in unauthorised stocks, the order will give the new trustees, *or purchasers from them*, the right to call for a transfer, etc. (*Re Peacock*, 14 Ch. D. 212).

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Provided that—

(a) Where the order is consequential on the appointment by the court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees ; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Trustee Act, 1893, s. 36.

36.—(1) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested (*a*) in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the applica-

(*a*) This includes a person contingently interested (*Re Sheppard*, 4 De G. F. & J. 423) ; but not the committee of a lunatic beneficiary (*Re Bourke*, 2 De G. J. & S. 426).

tion of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Vesting orders made by the lunacy judges.

With regard to vesting orders of property held by trustees who are lunatics or persons of unsound mind, s. 129 of the Lunacy Act, 1890 (53 Vict. c. 5), enables a Master in Lunacy to make on summons any such vesting order as the High Court can make under the Trustee Act, 1893 on the appointment of new trustees, in those cases where under s. 127 of the Lunacy Act, he appoints some person to exercise in the name of the lunatic *any power vested in the lunatic of appointing new trustees* (*b*); as to which the reader is referred to p. 323, *supra*. Where, however, the lunatic on whom the trust property is vested has not the power of appointing new trustees, a summons must be issued "in Lunacy" under ss. 135, 136 (*c*). But where the lunatic is "not so found," there is always the danger of his appearing on the hearing of such summons, and disputing the alleged lunacy. In that case the Lunacy Court has no jurisdiction to entertain the summons until the question of lunacy has been determined by means of an inquisition or a regularly constituted action for his removal in the Chancery Division (*d*).

Lunacy Act, 1890, s. 135,

Sections 135 and 136 of the Lunacy Act, 1890, are as follow:

135.—(1) When a lunatic (*e*) is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the judge in Lunacy may by order vest such land in such person or persons (*f*) for such estate, and in such manner, as he directs.

(*b*) *Re Fuller*, [1900] 2 Ch. 551.

(*c*) *Re Langdale*, [1901] 1 Ch. 3; and Lunacy Rules, Nov., 1900.

(*d*) *Re Combs*, 51 L. T. 45; *Re Walker*, Cr. & Ph. 147.

(*e*) This word includes lunatics not so found (s. 34). As to what the word comprises, see *Re Martin, Land, etc. Improvement Co.* v. *Martin*, 34 Ch. D. 618, and *Re Barber*, 39 Ch. D. 187, and *cf. Re Dewhirst*, 33 Ch. D. 416.

(*f*) The court will not vest the property in a beneficiary who is absolutely entitled, but will appoint a new trustee (*Re Holland*, 16 Ch. D. 672; *cf. Re Godfrey*, 23 *ib.* 205; and *Re Currie*, 10 Ch. D. 93). Where one of several trustees becomes insane, the court will not vest the property in the remaining trustees, even if it has jurisdiction to do so, but a new trustee must first be appointed (*Re Nash*, 16 Ch. D. 503), unless the fund is immediately divisible (*Re Watson*, 19 Ch. D. 384, and *Re Martyn*, 26 Ch. D. 745). As to whether this jurisdiction extends to leaseholds, see *supra*, p. 334, note (*m*).

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(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

(3) An order under sub-ss. (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

(4) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land, or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-ss. (1) and (2).

(5) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things.

Lunacy Act, 1890, s. 136.

136.—(1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose

in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint. Art. 61.

(4) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6) After notice in writing of an order under this section, it shall not be lawful for the bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

ART. 62.—*Severance of Trust on Appointment of new Trustees.*

"A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustee is to be appointed for such other parts. Any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part" (*g*).

Thus, if a testator gives real and personal estate to trustees, upon trust to pay the income to A. during her life, Explanatory example.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10, re-enacting Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 5, as amended by

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and after her death to sell and divide the proceeds into two parts, and to hold one of such parts in trust for A.'s daughter Mary, for life, with remainder for her children, and the other of such parts in trust for A.'s daughter Ann, for life, with remainder to her children; then upon the death of A., and the appointment of new trustees, separate sets of trustees may now be appointed to administer the trusts of Mary's and Ann's respective shares. It would seem that, before December 31st, 1882, this could not have been done, except by the court (*h*). The section applies notwithstanding that the trusts, although separate for a time, may ultimately again unite in favour of one individual (*i*).

Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 6, by which the decision of NORTH, J., in *Savile* v. *Couper*, 35 W. R. 829, was overruled.

(*h*) *Cooper* v. *Todd*, 29 W. R. 502. The court, however, could do it. See *Re Cunard*, 27 W. R. 52; *Re Moss*, 37 Ch. D. 513.

(*i*) *Re Hetherington*, 34 Ch. D. 211.

CHAPTER VII.

ADMINISTRATION OF NEW TRUSTS CREATED UNDER A POWER IN THE ORIGINAL SETTLEMENT.

Art. 63.—*By whom new Trusts created by Appointments are to be carried out.*

(1) Where the donee of a general power creates new trusts :

(a) if the appointment is made by an instrument not testamentary, he can nominate new trustees for carrying them out, to whom the old trustees must transfer the property ;

(b) if the appointment is made by a testamentary instrument the old trustees must transfer the property to the personal representatives of the appointor to be dealt with by them in due course of administration (*k*).

(2) Where the donee of a special power creates new trusts (*semble*) he cannot confide the administration of them to new trustees unless the power, either expressly or impliedly, authorises him to do so (*l*).

Paragraph (1) (a).

A general power being a power to appoint to any one in the world, it follows that the donee may, by instrument

Donee of general power may appoint by deed to new trustees.

(*k*) *Re Hoskins*, 5 Ch. D. 229 ; 6 *ib.* 281 ; *Hayes* v. *Oatley*, 14 Eq. 1 ; *Re Philbrick*, 13 W. R. 570 ; *Re Peacock*, *Kelcey* v. *Harrison*, [1902] 1 Ch. 552 (administration with will annexed).

(*l*) *Busk* v. *Aldam*, 16 Eq. 16 ; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172 ; *Re Tyssen*, *Knight-Bruce* v. *Butterworth*, [1894] 1 Ch. 56 ;

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inter vivos, appoint not merely in favour of persons to take beneficially, but in favour of persons who are to hold upon new special trusts. In either case the trusts of the old settlement are spent, and the trustees *functus officio*; and their sole remaining duty is to transfer the property to the appointees, whether they be beneficial or fiduciary.

PARAGRAPH (1)(b).

Where general power exercised by will, property must in first instance be handed to personal representative.

But where the appointment is made by a testamentary instrument the matter is somewhat different. In that case the appointor by exercising the power makes the property assets for the payment of his debts in due order of administration (*m*). He therefore, by the mere fact of the appointment, gives an interest to his personal representative, who may require the fund for debts or death duties. Consequently the trustees of the settlement must transfer the fund to the personal representative or according to his direction (*n*). If the appointor has declared new trusts, and appointed new trustees for carrying them out, then, of course, it will be the duty of the personal representative to transfer or direct the transfer to them of so much as he may not require for debts or duties. But the functions of the old trustees cease in either case on the death of the appointor.

PARAGRAPH (2).

Whether donee of special power can appoint to new trustees is a question of construction.

Appointments creating new trusts under special or limited powers give rise to more difficulty. As Mr. Justice FARWELL says in his work on "Powers" (*o*): "A settlor or testator who vests funds in trustees, and provides machinery for filling up vacancies in their number, may well be taken to have intended that the fund shall remain in the custody of the persons to whom he has entrusted it,

and *per* COTTON, L.J., in *Scotney* v. *Lomer*, 31 Ch. D. 380; but *cf. Redgate, Marsh* v. *Redgate*, [1903] 1 Ch. 356.

(*m*) *Lasselles* v. *Cornwallis*, 2 Vern. 465; *Holmes* v. *Coghill*, 7 Ves. 499; *Pardo* v. *Bingham*, 6 Eq. 485.

(*n*) See cases cited, p. 343, note (*k*), *supra*.

(*o*) Farwell on Powers, 2nd ed., p. 326.

until some beneficiary absolutely entitled is ready to receive it; although he has given power to another to say who the beneficiary shall be. He may well trust, (say) his daughter, to select which of her children shall take the fund, and yet not desire her to nominate the trustees who are to hold it."

Thus, in *Re Tyssen, Knight-Bruce* v. *Butterworth* (*p*), under a special power in favour of children, the donees appointed in favour of one daughter upon certain trusts in favour of another daughter; but it was held that the fund ought not to be transferred to the first daughter as trustee under the appointment, but ought to be retained by the trustees of the settlement. The same view had been previously taken in *Busk* v. *Aldam* (*q*), and *Von Brockdorff* v. *Malcolm* (*r*).

On the other hand, in the very recent case of *Re Redgate, Marsh* v. *Redgate* (*s*), Buckley, J., held, that under a power to appoint to children "for such estate or estates manner and form" as the donee of the power should direct, the power was well exercised by an appointment to new trustees upon trust for sale and distribution of the proceeds among the children. His lordship seems to have based his judgment on the analogy of powers operating to transfer the legal estate under the Statute of Uses, with regard to which it had been held in several cases (*t*) that such powers authorised an appointment to trustees upon trust for sale. But, with unfeigned respect, it is suggested, that where a settlor has confided the property to trustees upon such trusts as another shall appoint, he has himself chosen the hands to administer the trust; whereas in the case of powers operating under the Statute of Uses he has not done so. His lordship, however, seems impliedly to admit in his judgment that he was bound to find something in the language of the settlement

(*p*) [1894] 1 Ch. 56.
(*q*) 19 Eq. 16; and see *per* Cotton, L.J., in *Scotney* v. *Lomer*, 31 Ch. D. 380.
(*r*) 30 Ch. D. 172.
(*s*) [1903] 1 Ch. 356.
(*t*) *Kenworthy* v. *Bate*, 6 Ves. 793; *Cowx* v. *Foster*, 1 J. & H. 30; *Fowler* v. *Cohen*, 21 Beav. 360; *Re Paget*, [1898] 1 Ch. 290.

Art. 63. justifying the appointment to new trustees; and accordingly fixed on the words "manner and form," which, by contrast with the words "estate or estates," seemed to him to imply a power to do something else than to give an estate to children: in other words to imply a power to "give to a child in some manner and form an interest in the property which shall not be an estate in the property itself." This ingenious distinction, however, seems somewhat subtle for these degenerate days.

CHAPTER VIII.

THE RIGHTS OF TRUSTEES.

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ART. 64.—*Right to Reimbursement and Indemnity.*

(1) A trustee is entitled to be reimbursed out of the trust property (*a*) all expenses which he has properly incurred (*b*), having regard to the circumstances of each particular case (*c*).

(2) Although, as between the beneficiaries, such expenses are generally payable out of capital (*d*), the trustee has a lien for them, on both capital and income (*e*), in priority to the claims of the beneficiaries (*f*).

(3) Where the only beneficiary is a person *sui juris*, the right of the trustee to indemnity against liabilities incident to the legal ownership of the

(*a*) *Re Earl of Winchilsea*, 39 Ch. D. 168.
(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24; *Worrall* v. *Harford*, 8 Ves. 8; *Re German Mining Co.*, 4 D. M. & G. 19.
(*c*) *Leedham* v. *Chawner*, 4 K. & J. 458.
(*d*) *Carter* v. *Sebright*, 26 Beav. 374.
(*e*) *Stott* v. *Milne*, 25 Ch. D. 710; *Ex parte James*, 1 D. & C. 272; *Ex parte Chippendale*, 4 D. M. & G. 19; and see *Walters* v. *Woodbridge*, 7 Ch. D. 504.
(*f*) *Dodds* v. *Tuke*, 25 Ch. D. 617; *Mathias* v. *Mathias*, 3 Sm. & G. 552; *Re Griffith, Jones* v. *Owen*, [1904] 1 Ch. 807.

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trust property, is not limited to that property, but is enforceable in equity against the beneficiary personally, unless he is in a position to disclaim the property (*g*).

(4) Where a trustee has committed a breach of trust, he will not be allowed his expenses until he has made good the breach (*h*).

(5) A person against whose claims the trustee is by the settlement entitled to be indemnified, is allowed to stand in the trustee's place, by way of subrogation, against the fund which the settlor has expressly dedicated for the purpose (*i*).

PARAGRAPH (1).

Damages recovered by third parties.

In *Benett* v. *Wyndham* (*k*), a trustee, in the due execution of his trust, directed a bailiff, employed on the trust property, to have certain trees felled. The bailiff ordered the wood-cutters usually employed on the property to fell the trees. In doing so they negligently allowed a bough to fall on to a passer-by, who, being injured, recovered heavy damages from the trustee in a court of law. These damages were, however, allowed to the trustee out of the trust property.

Calls on shares.

So where a trustee of shares has been obliged to pay calls upon them, he is entitled to be reimbursed (*l*); and the right to be indemnified accrues directly the liability is proved to exist (*m*). However, there must be some proof that the liability is not merely imaginary; for a person entitled to be

(*g*) *Hardoon* v. *Belilios*, [1901] A. C. 118. The previous cases at *law* such as *Hosegood* v. *Pedler*, 66 L. J. Q. B. 18, are inapplicable, the right being peculiarly an equitable one. *Cf. Jervis* v. *Wolferstan*, 18 Eq., at p. 24; *Fraser* v. *Murdoch*, 6 App. Cas., at p. 872; *Re German Mining Co.*, 4 D. M. & G. 19, 54; *Hobbs* v. *Wayet*, 36 Ch. D. 256.

(*h*) *Re Knott*, *Bax* v. *Palmer*, 56 L. J. Ch. 318.

(*i*) See cases cited *infra*, p. 357, notes (*h*) and (*i*).

(*k*) 4 D. F. & J. 259; and see *Re Raybould*, *Raybould* v. *Turner*, [1900] 1 Ch. 199.

(*l*) *James* v. *May*, L. R. 6 H. L. 328; *Re National Finance Co.*, 3 Ch. App. 791; *Fraser* v. *Murdoch*, 6 App. Cas. 855. See also, as to right of executor to recover calls from a residuary legatee, *Re Kershaw*, *Whitaker* v. *Kershaw*, 45 Ch. D. 320.

(*m*) *Hobbs* v. *Wayet*, 36 Ch. D. 256.

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indemnified cannot claim a declaration of his right to indemnity before the contingency which creates the damage has arisen (*n*). Therefore, although a trustee may, as such, be a member of a company which is being wound up, he cannot bring an action to establish his right to an indemnity, unless he can establish the fact that calls *must* be made (*n*).

Indemnity for liabilities incurred in carrying on trust business.

So where trustees or executors have *rightly* carried on a business in accordance with the provisions of a will or settlement, they are entitled to be indemnified out of the trust estate against any liabilities which they have properly incurred (*o*). And this right will prevail even against creditors *of the testator* himself if they have assented to the business being carried on in the interest as well of themselves as of the beneficiaries under the will (*o*). But where the settlement has directed a trustee to employ a specific portion only of the estate for the purpose of carrying on the business, the rule is, that, although the trustee is personally liable to creditors for debts incurred by him in carrying on the trade pursuant to the settlement, his right to indemnity is limited to the specific assets so directed to be employed (*p*).

Solicitor's costs.

A trustee or executor will be allowed the amount of a solicitor's bill of costs which he has paid for services rendered in the matter of the trust (*q*); even, it would seem, where the necessity for the services arose through want of caution on the part of the trustee: *e.g.*, where proceedings had to be taken by an administrator against an agent to whom he had entrusted money to make payments (*r*). However, under the Solicitors Act (6 & 7 Vict. c. 73), s. 39, beneficiaries may, at the discretion of the court, obtain an order to tax the costs of the trustee's solicitor (*s*).

(*n*) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

(*o*) *Dowse* v. *Gorton*, [1891] A. C. 190; *Re Evans, Evans* v. *Evans*, 34 Ch. D. 597.

(*p*) *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; *Re Webb, Leedham* v. *Patchett*, 63 L. T. 545. As to the right of creditors of the business to be placed in the shoes of the trustee by way of subrogation, see *infra*, p. 357.

(*q*) *Macnamara* v. *Jones*, Dick. 587.

(*r*) *Re Davis, Muckalt* v. *Davis*, W. N. (1887), p. 186, *sed quære.*

(*s*) But see *Re Wellborne*, [1901] 1 Ch. 312. As to the principle on which such taxations should proceed, see *Re Miles*, [1903] 2 Ch. 518.

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Costs of administration suit, together with "costs, charges, and expenses."

Unless trustees have been guilty of misconduct, they are entitled to their costs of an action for the administration of the trust as between solicitor and client, and not merely as between party and party (*t*); and, in addition thereto, any other costs charges and expenses properly incurred by them in the execution of the trust.

Depriving trustees of costs of litigation.

Where, however, the court, on the hearing of a summons for administration, "does not think fit to make any order as to costs," that is merely a euphemistic way of *depriving* the trustees of their costs of the summons, and they cannot afterwards claim them as "costs, charges, and expenses" incurred in the execution of the trust (*u*). To deprive a trustee of his costs has, however, been called "a violent exercise" of the court's discretion (*x*); and, contrary to the usual rule of the court, an order depriving a trustee of costs, or limiting him to a particular fund, is appealable by him on that ground (*y*). On the other hand, if he be allowed costs, the beneficiaries cannot appeal against such allowance (*z*). Nevertheless a trustee who acts unreasonably may not only be deprived of costs, but be ordered to pay those of the plaintiff. For instance, in one case, a trustee whose trust had become a simple trust, and who neglected for twenty-eight days after demand to transfer the trust property to the beneficiary, was not only deprived of costs, but ordered to pay those of the plaintiff (*a*).

Costs of trustees who have committed a breach of trust.

Where the sole object of a suit is to make trustees answerable for breach of trust, and a judgment to that effect is obtained, the trustees will not only not get their costs allowed, but will almost invariably have to pay the costs of the plaintiffs up to the judgment (*b*). The costs subsequent to the judgment will be in the discretion of the judge, who may

(*t*) *Re Love, Hill* v. *Spurgeon*, 29 Ch. D. 348.
(*u*) *Re Hodgkinson, Hodgkinson* v. *Hodgkinson*, [1895] 2 Ch. 190.
(*x*) *Birks* v. *Micklethwait*, 34 L. J. Ch. 364.
(*y*) See *Re Chennell, Jones* v. *Chennell*, 8 Ch. D. 492; *Re Love, Hill* v. *Spurgeon*, 29 Ch. D. 348; *Re Knight's Will*, 26 Ch. D. 82.
(*z*) *Charles* v. *Jones*, 33 Ch. D. 80.
(*a*) *Re Knox*, [1895] 2 Ch. 483.
(*b*) *Per* LORD LANGDALE, *Byrne* v. *Norcott*, 13 Beav. 336; *Gough* v. *Etty*, 20 L. T. 358; *Easton* v. *Landor*, 67 L. T. 833.

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disallow the trustee his costs if he considers that, but for the trustee's misconduct, there would have been no need for the action at all (*c*). And the same result will follow where the conduct of a trustee is vexatious or oppressive (*d*), or unreasonably cautious (*e*). But where an administration suit is necessary *apart from the breach of trust*, and the latter only forms an incidental feature of the suit, the trustee will, as a rule, be allowed his general costs of the suit as between solicitor and client, although he may have to pay the special costs caused by the breach (*f*).

One set of costs only allowed where trustees unreasonably sever.

If trustees are co-plaintiffs or co-defendants, they ought, except under special circumstances, to sue or defend jointly (*g*), and will only be allowed one set of costs between them (*h*), to be apportioned by the taxing master (*i*); and if a trustee improperly refuses to join his co-trustee as plaintiff, and consequently has to be made a defendant, he may be deprived of costs altogether (*h*). But, on the other hand, where, owing to one trustee being also a beneficiary, it is necessary that one should be plaintiff, and the other defendant, they will each be allowed separate sets of costs as between solicitor and client (*k*); and the same rule prevails where one of the trustees is attacked hostilely, in which case he may employ two counsel (*l*).

Other instances of costs, charges, and expenses allowed trustees.

It has been held that a trustee is entitled to be reimbursed costs of former trustees, paid by him to their personal representatives previously to the latter transferring the trust

(*c*) *Easton* v. *Landor*, *supra*.

(*d*) See *Marshall* v. *Sladden*, 4 De G. & Sm. 468; *Patterson* v. *Wooler*, 2 Ch. D. 586; *Attorney-General* v. *Murdoch*, 2 K. & J. 571; *Palairet* v. *Carew*, 32 Beav. 564; *Griffen* v. *Brady*, 39 L. J. Ch. 136.

(*e*) *Smith* v. *Bolden*, 33 Beav. 262; *Re Cull*, 20 Eq. 561; *Firmin* v. *Pulham*, 2 D. & S. 99; *Cockcroft* v. *Sutcliffe*, 25 L. J. Ch. 313; and see also cases collected in Morgan and Wurtzburg's Treatise on the Law of Costs, 2nd ed., pp. 412 *et seq.*

(*f*) *Pride* v. *Fooks*, 2 Beav. 430; *Campbell* v. *Bainbridge*, 6 Eq. 269; *Bell* v. *Turner*, 47 L. J. Ch. 75.

(*g*) Morgan and Wurtzburg's Treatise on Costs, 2nd ed., pp. 124—126, and 403.

(*h*) *Hughes* v. *Key*, 20 Beav. 395; *Gompertz* v. *Kensil*, 13 Eq. 369.

(*i*) *Re Isaac*, *Cronbach* v. *Isaac*, [1897] 1 Ch. 251.

(*k*) *Re Love*, *Hill* v. *Spurgeon*, *supra*.

(*l*) *Re Maddock*, *Butt* v. *Wright*, [1899] 2 Ch. 588.

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estate (*m*). He is also entitled to be reimbursed costs incurred by him previously to his appointment, in obtaining a statement of the trust property, and ascertaining that the power of appointing new trustees was being properly exercised (*n*); and also costs incurred by the donee of the power of appointment in relation to the trustee's appointment (*m*).

Expenses incurred in unsuccessfully defending an action

But where a trustee takes upon himself the responsibility of unsuccessfully defending an action in relation to the trust estate without procuring the sanction of the court, the *onus* lies upon him of proving that he had reasonable grounds for defending it. If he cannot prove such grounds, he is not entitled to retain out of the trust property the costs of the action beyond the amount which he would have incurred if he had applied for leave to defend (*o*).

Costs of premature sale.

And so where trustees attempted, at the solicitation of their beneficiaries, *some of whom were married women without power of anticipation*, to sell the trust property before the date named in the settlement, it was held that they were not entitled to be indemnified against the costs of an action brought against them by the purchaser (*p*).

Unreasonable expenses disallowed.

Neither will trustees be allowed to reimburse themselves *every* out-of-pocket expense, but only such as are reasonable and proper under the circumstances. Thus, the expenses of a trustee's journeys to Paris, in order that he might be present at the hearing of a suit brought in the French courts (the sole question being one of French law, and not of fact), were disallowed (*q*).

Voluntary subscriptions.

As a general rule, the payment by trustees of voluntary subscriptions for public or charitable objects is not allowed. But nevertheless they may be in exceptional cases—for instance, where they are reasonable and made in the honest belief that the payment will benefit the estate (*r*). Upon this

(*m*) *Harvey* v. *Ollivr*, W. N. (1887), 149.
(*n*) *Re Pumphrey, Worcester, etc. Banking Co.* v. *Blick*, 22 Ch. D. 255.
(*o*) *Re Beddoe, Downes* v. *Cottam*, [1893] 1 Ch. 547.
(*p*) *Leedham* v. *Chawner*, 4 K. & J. 458.
(*q*) *Malcolm* v. *O'Callaghan*, 3 My. & Cr. 52.
(*r*) *How* v. *Ld. Winterton*, 51 W. R. 262. See also *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879, where the court sanctioned the payment of charitable subscriptions.

ground the payment of subscriptions to a church school were allowed by KEKEWICH, J., there being evidence that if the subscriptions had been denied, a school board would have become necessary; in which case the estate would have had to pay considerably more than the subscriptions in the way of rates (*r*). Art. 64.

Unnecessary law costs.

A trustee, although entitled to obtain legal advice in relation to the execution of the trust, is not entitled, out of an excess of caution, to charge the estate with unnecessary legal proceedings. For instance, on retirement, he is not entitled to have an attested copy of the settlement, or of the appointment of new trustees, made at the expense of the estate (*s*).

PARAGRAPH (2).

Paramount lien on trust property for trustees' expenses.

In an administration action, if it appears probable that the trust fund will be insufficient for the payment of the whole of the costs in full, the trustees are entitled to have inserted in the order a direction, that if the trust funds should be insufficient to pay the whole of the costs, their costs, charges, and expenses shall be paid in priority to those of the beneficiaries (*t*). In short, the trustees' lien takes precedence of all beneficial interests, and this not only as against original beneficiaries, but also all purchasers or mortgagees claiming through or under them (*u*). Even where property is settled on a married woman for life, without power of anticipation, and she improperly commences administration proceedings, which are dismissed with costs against her personally, the court may authorise the trustees to recoup themselves out of her life interest (*x*).

Trustees' lien good even where settlement void under Bankruptcy Act.

One Holden executed a post-nuptial voluntary settlement. He subsequently commenced an action to set it aside, but failed in his contention, the action being dismissed with costs. He then became bankrupt within two years of the date of the

(*s*) *Warter* v. *Anderson*, 11 Hare, 301, and see Art. 67, *infra*.

(*t*) *Dodds* v. *Tuke*, 25 Ch. D. 617. But even without this direction the trustees would be entitled to be paid in priority to the other parties (*Re Griffith, Jones* v. *Owen*, [1904] 1 Ch. 807).

(*u*) *Re Knapman, Knapman* v. *Wreford*, 18 Ch. D. 300.

(*x*) *Re Andrews, Edwards* v. *Dewar*, 30 Ch. D. 159; and *cf.* Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

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settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). It was held that, although the settlement was void, yet as it had originally been valid, but voidable, and as the trustees had incurred costs in the execution of their duty which they could not recover from the bankrupt, they were entitled to be fully indemnified out of the trust funds (*y*). It would seem, however, that the same principle does not apply to settlements void under the 13 Eliz. c. 5, or to cases where the execution of the settlement was an act of bankruptcy (*z*).

Exception where trustee has mixed his money with trust fund.

Where, however, a trustee for purchase has advanced money of his own to enable a particular property to be purchased, the price of which exceeded the whole trust fund, it was held that he had not a *first* charge on the property for reimbursing himself his advance; but that the beneficiaries had a first charge on the estate for the amount of the trust fund, and that he only had a second charge for the amount of his advance (*a*). The *ratio decidendi* in this case would seem to have been, that it was not so much a question of indemnity for *costs and expenses incurred in the performance of his duty*, as of a gratuitous mixing of his own moneys with the trust moneys; and that this (as will be seen later on (*b*)) gave the trust estate a first and paramount charge.

PARAGRAPH (3).

Personal indemnity by beneficiary under a simple trust.

Fifty shares in a company were placed in the plaintiff's name, in 1891, by his employers, who were share brokers. He had no beneficial interest in them, and was merely a bare trustee for the employers. Ultimately the defendant, as successor in title of the employers, became beneficially entitled to the shares, and received the dividends. Subsequently a call was made which the plaintiff was obliged to pay, and thereupon he sued the defendant, who refused to indemnify him. On these facts it was held that the plaintiff was entitled to be indemnified by the defendant personally. Lord Lindley

(*y*) *Re Holden*, 20 Q. B. D. 43.
(*z*) See *Re Butterworth, ex parte Russell*, 19 Ch. D. 588; *Dutton* v. *Thompson*, 23 Ch. D. 278; *Ex parte Vaughan*, 14 Q. B. D. 25.
(*a*) *Re Pumphrey, Worcester, etc. Banking Co.* v. *Blick*, 22 Ch. D. 255.
(*b*) Art. 73, *infra*.

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said: "The plainest principles of justice require that the *cestui que* trust, who gets all the benefit of the property, should bear its burdens, unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of the trustee to be indemnified *out of the whole trust estate* against any liabilities accruing out of any part of it is clear and indisputable; although if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incident to one of them cannot be thrown on the beneficial owners of the others. . . . But where the only *cestui que* trust is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que* trust a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but as old as trusts themselves. . . . Although the defendant did not create the trust, he accepted a transfer of the beneficial ownership in the shares with full knowledge of the fact that they were registered in the plaintiff's name as trustee for their original purchasers and their assigns, whoever they might be" (*c*).

Right to personal indemnity does not extend to special trusts.

The above decision, however, only related to the case of a single adult beneficiary. As Lord Lindley observed, "it is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the plaintiff on trusts for tenants for life or for infants, or upon special trusts limiting the right to indemnity. In these cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the burdens incident to his legal ownership; and the trustee accepts the trust *knowing that under such circumstances and in the absence of special contract his right to indemnity cannot extend beyond the trust estate*

(*c*) *Hardoon* v. *Belilios*, [1901] A. C. 118.

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—*i.e.*, beyond the respective interests of his *cestuis que* trusts. In this case their Lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim."

Trustees of clubs have no right to personal indemnity.

As an illustration of the remarks in the last paragraph may be cited the case of trustees of a members' club. "It is a fundamental condition of clubs that members are not legally liable to anyone beyond the amount of their subscriptions." There is therefore in the nature of the transaction an implied bargain that they shall not as beneficiaries be liable to indemnify the trustees (*d*), and the trustees are taken to accept the office with knowledge of this condition.

PARAGRAPH (4).

Trustee can only receive costs where he has discharged his own indebtedness to the estate.

It sometimes happens that in the course of an administration action or summons a trustee is ordered to refund to the estate money lost by reason of some breach of trust for which he is responsible, but that he is nevertheless allowed his costs of the litigation either in the whole (*e*) or limited to costs incurred after the judgment. In all such cases, however, he will not be allowed to receive them (or his costs, charges, and expenses properly incurred outside the litigation) until he has made good the loss to the estate caused by his breach (*f*). In practice the costs are set off against the liability, the trustee either receiving or paying the balance only. This principle sometimes causes hardship to the solicitor of an insolvent trustee, as he loses the security of the estate for the costs of what may have been a costly litigation and cannot recover them from his own insolvent client (*g*). But the same risk is run by all persons who deal with trustees, for (as will be seen from the next paragraph) there is no privity between them and the trust estate; and at most they can only claim to be placed in the position of the trustee himself against the estate, by way of subrogation.

(*d*) *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139.
(*e*) See *supra*, p. 351.
(*f*) *Re Knott, Bax* v. *Palmer*, 56 L. J. Ch. 318.
(*g*) *Lewis* v. *Trask*, 21 Ch. D. 862; *Re Basham, Hannay* v. *Basham*, 23 *ib.*, 195; *McEwen* v. *Crombie*, 25 Ch. D. 175. But *cf. Clare* v. *Clare*, 21 Ch. D. 865, *contrâ*.

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PARAGRAPH (5).

Persons employed by, or who supply goods to, the trustee have no direct claim on estate.

Persons to whom a trustee has incurred liability, have no original or direct right to claim payment out of the trust estate. This question usually arises in relation to a trust business, *i.e.*, the business of a testator carried on rightly or wrongly by his trustees. In such cases the creditors of the business have no original right to claim payment of their debts out of the *trust estate* (*h*), their remedy being against the trustee whom they trusted. Nevertheless, they have also a right to be *put in his place* against the trust estate (*h*); and if the trustee has a right to reimbursement out of the trust estate, the creditors may, by subrogation, claim to have the benefit of it. But this right is strictly limited to the right of the trustee himself. Therefore, if he is (by reason of breach of trust or otherwise) himself indebted to the trust estate to an extent exceeding his claim to indemnity, then, inasmuch as he cannot be entitled to an indemnity except upon the terms of making good his own indebtedness to the trust, the creditors are in no better position, and can have no claim against the estate (*i*). But in a recent case it was held by KEKEWICH, J., that the right of the creditors to subrogate was not precluded by the fact that *one* of several trustees was a defaulter, inasmuch as the non-defaulting trustees were entitled to be indemnified (*j*).

Right of subrogation not extended to liabilities not authorised by settlement even where trustee would be excused breach of trust.

It would seem, however, that the right of subrogation is confined to cases where the settlor has, by the settlement, authorised the liabilities, and dedicated either the whole or a specific part of the trust estate for meeting them; and that it has no application to cases where a trustee has, contrary to the trust but by way of salvage, incurred liabilities; even

(*h*) *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; *Re Webb, Leedham* v. *Patchett*, 63 L. T. 545; *Strickland* v. *Symons*, 26 Ch. D. 245; and see also *Redman* v. *Rymer*, 60 L. T. 385; *Lady Wenlock* v. *River Dee Commissioners*, 19 Q. B. D. 155; and as to torts, *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199.

(*i*) *Re Johnson, Shearman* v. *Robinson, supra; Ex parte Garland*, 10 Ves. 110; recognised in *Re Blundell, Blundell* v. *Blundell*, 44 Ch. D., at p. 11. As to the right of the trustee to indemnity against the estate, see *supra*, p. 349.

(*j*) *Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342.

Art. 64. although as between him and his beneficiaries the court would allow him to reimburse himself out of the estate (*k*). In short, in the words of Lord SELBORNE, "the creditor can only have recourse to the particular part of the property of which there has been *an express dedication*: and the right cannot be extended beyond that, either in bankruptcy or administration" (*k*).

ART. 65.—*Right to Discharge.*

Upon the completion of the trust, a trustee is entitled to have his accounts examined and settled by the beneficiaries; and either to have a formal discharge given to him or to have the accounts taken in court. He cannot, however, as a rule, demand a release under seal (*l*).

Release under seal not usually demandable.

A trustee, on finally transferring stock to a beneficiary, demanded from the latter a deed of release. The beneficiary, however, refused to give him anything except a simple receipt for the amount of stock actually transferred; which, of course, left it open to him to say that that amount was not the amount to which he was entitled. The court held, that no *deed* was demandable; but the judge said: "Though it may not have been the right of the trustee to require a deed, I think that it was his right to require that his account should be settled; that is to say that he and his family should be delivered from the anxiety and misery attending unsettled accounts" (*m*).

"In the case of an express trust, when the trust is apparent on the face of the deed, the fund clear, the trust clearly defined, and the trustee is paying either the income or the capital of

(*k*) *Strickland* v. *Symons*, 26 Ch. D. 245; and see *Re German Mining Co.*, 4 D. M. & G. 19; and *Labouchere* v. *Tupper*, 11 Moo. P. C. 198. Whether the decision in *Re Raybould*, *Raybould* v. *Turner*, *supra*, is consistent with this seems questionable.

(*l*) *Chadwick* v. *Heatley*, 2 Coll. 137; *Re Wright*, 3 K. & J. 419; *King* v. *Mullins*, 1 Drew. 308; and see *Re Lord Stamford*, *Payne* v. *Stamford*, [1896] 1 Ch., at p. 301.

(*m*) *Chadwick* v. *Heatley*, 2 Coll. 137.

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the fund, if he is paying it in strict accordance with the trusts, he has no right to require a release under seal. It is true that in the common case of *executors*, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation; therefore, he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund; and therefore it is usual to give a release; but such a claim on the part of *a trustee* would, in strictness, be improper, if he is paying in accordance with the letter of the trust. In such a case he would have no right to a release" (*n*).

Release may be required in exceptional cases.

Where trust moneys have been re-settled, the trustees or executors of the original settlement or will are, it has been said, entitled to a release under seal from their beneficiaries; though they are entitled only to a mere receipt from the trustees to whom they pay the moneys (*o*). But on the other hand, where a person, having a *general* power of appointment by will, appoints the fund in pursuance of the power and appoints executors, the trustees of the fund can safely hand it over to the executors on their receipt, and cannot demand a release under seal from the beneficiaries (*p*); for, by appointing, the donee of the power makes the property assets of his own.

ART. 66.—*Right to take Direction of a Judge* (*q*).

(1) Trustees may, in cases of doubt as to what course they ought to adopt, safe-guard themselves by taking out an originating summons, returnable in the chambers of a judge of the Chancery

(*n*) *Per* KINDERSLEY, V.-C., in *King* v. *Mullins*, 1 Drew. 311.
(*o*) *Re Cater*, 25 Beav. 366.
(*p*) *Re Hoskin*, 5 Ch. D. 229; 6 *ib.* 281, and see *supra*, p. 345.
(*q*) The taking of a judge's advice on petition, under the statute 22 & 23 Vict. c. 35, s. 30, is obsolete.

ART. 66. Division, for the determination (without general administration by the court) of :—

(a) any question affecting the rights or interests of the beneficiaries (*r*) ;

(b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others (*s*) ;

(c) the approval of any sale, purchase, compromise, or other transaction (*t*) ;

(d) the determination of any question arising in the administration of the trust (*u*), including any question as to the proper construction of the settlement (*x*).

(2) The judge has power on such summons to make declarations binding the parties ; but as a general rule no such declarations will be made as to future or contingent rights, except where the futurity is not remote, or the contingency is about to be destroyed, and the parties reasonably desire to ascertain their rights so as to mould their conduct accordingly (*y*).

Almost any question of construction or administration can now be decided on originating summons, except (1) cases in which it is sought to make trustees responsible for breach of trust, at all events where wilful default is charged (*z*) ; or (2) questions affecting a person claiming adversely to the settlement (*a*) ; or (3) questions involving the cancellation of

(*r*) R. S. C. 1883, Ord. LV. r. 3 (a). A similar summons may be taken out by any of the *cestuis que trusts*.

(*s*) *Ib.* (b).

(*t*) *Ib.* (f).

(*u*) *Ib.* (g).

(*x*) R. S. C. 1893, Ord. LIVa.

(*y*) See *Re Behrens*, W. N. (1888), p. 95.

(*z*) See *per* Lord MACNAGHTEN, *Dowse* v. *Gorton*, [1891] A. C. 202 ; and see *Re Weall, Andrews* v. *Weall*, 42 Ch. D. 674 ; and *Re Hengler, Crowde* v. *Hengler*, W. N. (1893), p. 37.

(*a*) *Re Bridge, Franks* v. *Worth*, 56 L. J. Ch. 779 ; *Re Royle, Royle* v. *Hayes*, 43 Ch. D. 18.

instruments (*b*). To these exceptions were formerly added, questions as to a *legal* devise (*c*); but under R.S.C. 1893, Ord. LIVa., such questions can now be dealt with on originating summons. In a recent case, where new trustees refused to act until it was determined whether the old ones were liable for a loss, the court on summons declared that the old ones were not liable (*d*). The reader is referred for other examples of cases decided on originating summons to the Annual or the Yearly Practice, Ord. LV., r. 3.

Art. 67.—*Right to pay Trust Funds into Court under certain Circumstances.*

"(1) Trustees, or the majority (*e*) of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of court, be dealt with according to the Orders of the High Court" (*f*).

(2) Payment into court is not, however, justifiable merely in order to determine some question which can be determined more cheaply by means of an originating summons (*g*), nor where the

(*b*) See *Re Garnett, Gandy* v. *Macauley*, 32 W. R. 474; and *Re Ellis, Kelson* v. *Ellis*, 59 L. T. 924.

(*c*) *Re Carlyon, Carlyon* v. *Carlyon*, 35 W. R. 155; *Re Davies, Davies* v. *Davies*, 38 Ch. D. 210; *Re Royle, Royle* v. *Hayes*, *supra*.

(*d*) *Re Irwin, Barton* v. *Irwin*, W. N. (1895) 23.

(*e*) The court can compel a dissentient minority to stand aside. See Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42 (3).

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42. It would seem at first sight that by the operation of sub-s. (6) of s. 25 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), these provisions are extended to all constructive trustees, such as insurance companies, etc. But although in one case (*Re Haycock*, 1 Ch. D. 611) this was held to be so, that view has been twice dissented from (*Matthew* v. *Northern Assurance Co.*, 9 Ch. D. 80, and *Re Sutton*, 12 Ch. D. 175). Whether, however, these cases are still binding authorities, having regard to s. 10 of the Trustee Act, 1893 (definition of "Trustee"), seems open to question.

(*g*) *Re Giles*, 34 W. R. 712.

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equities are perfectly clear (*h*); and if trustees pay in under such circumstances, they may have to pay the costs of getting the money paid out (*i*).

Payment into court where beneficiaries are under disability.

A trustee is justified in paying money into court where he cannot get a valid discharge; as, for instance, where beneficiaries who are absolutely entitled are infants (*k*) or lunatics (*l*).

Dispute between beneficiaries.

Formerly where, under a creditor's deed, money was claimed both by the settlor and the creditors, the trustee was held to have been justified in paying the money into court (*m*).

Where money claimed by a representative.

It has been said that a trustee may properly pay money into court where it is claimed by the representative of a beneficiary; for *non constat* but that the latter may have disposed of it (*n*). But here again an originating summons would seem to be the more appropriate course.

Payment to one who claims in default of appointment.

A trustee ought not to hesitate to pay the money to a beneficiary who claims in default of appointment, if he has no notice of any appointment by the donee of the power, and no ground for believing that any appointment has been made. For in that case he could not be made liable if he paid over the fund, even if an appointment were subsequently discovered (*o*). Anyhow, now, a trustee in such a case would only be allowed the costs of a summons.

Payment into court to enable married woman to assert equity to a settlement.

Where the beneficiary is a married woman, married before 1883, and whose *title* accrued prior to that date, it has been held that the trustee may pay into court, in order that she may assert her equity to a settlement. But this would not be so in cases to which the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), applies.

(*h*) *Re Cull*, 20 Eq. 561; *Re Elliott*, 15 Eq. 194.
(*i*) *Ib.*, and *Re Leake*, 32 Beav. 134; *Re Heming*, 3 K. & J. 40.
(*k*) *Re Cawthorne*, 12 Beav. 56; *Re Beauclerk*, 11 W. R. 203; *Re Coulson*, 4 Jur. (N.S.) 6.
(*l*) *Re Upfull*, 3 M. & G. 281; *Re Irby*, 17 Beav. 334; and see *Re Carr*, *Carr* v. *Carr*, [1904] 1 Ch. 792.
(*m*) *Re Headington*, 6 W. R. 7; but see *Re Moseley*, 18 W. R. 126.
(*n*) *Re Lane*, 24 L. T. 181; *King* v. *King*, 1 D. & J. 663, *sed quære*.
(*o*) *Per* JESSEL, M.R., *Re Cull*, 20 Eq. 561, distinguishing *Re Wylly*, 28 Beav. 458; but see also *Re Swan*, 2 H. & M. 34; *Re Roberts*, 17 W. R. 639; *Re Bendyshe*, 5 W. R. 816; *Re Williams's Settlement*, 1 K. & J. 87.

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Reasonable doubt or claim.

Again, where the trustee has a *bonâ fide* doubt as to the law (*p*), or has received a *bonâ fide* claim sanctioned by respectable solicitors (*q*), he may properly pay the fund into court, unless the question can be settled by summons. For instance, where a necessary party to a summons is out of the jurisdiction, so that the summons could not be served, payment into court would be justifiable.

Undue caution.

But where a beneficiary in reversion who had gone to Australia, and had not been heard of for some years, suddenly reappeared, and there was no reasonable doubt as to his identity, it was held that the trustee was not entitled to pay the trust fund into court, and he was ordered to *pay* the costs of all parties (*r*).

General warning.

Lastly, the reader must be warned that now that most questions of doubt or difficulty can be decided on originating summons, the right of paying money into court can only be used with safety in very rare cases. It seems matter for regret that those who were responsible for the drafting of the Trustee Act, 1893 (56 & 57 Vict. c. 53), did not insert some words in s. 42, warning trustees of the danger they run in accepting the apparently unconditional invitation extended to them by the words of that section, an invitation which in most cases can only be accepted at the risk of having to pay costs.

Art. 68.—*Right under certain Circumstances to have the Trust administered by the Court.*

(1) Where the trust property is not capable of being paid or transferred into court, *or* where the trustee reasonably wishes to be discharged from the *office of trustee* (*s*), he may institute an action for the administration of the trust by the court (*t*).

(*p*) *King* v. *King*, 1 D. & J. 663; *Re Metcalfe*, D. J. & S. 122; *Gunnell* v. *Whitear*, 10 Eq. 664.

(*q*) *Re Maclean*, 19 Eq. 274.

(*r*) *Re Elliott*, 15 Eq. 194; *Re Foligno*, 32 Beav. 131; *Re Knight*, 27 *ib.* 45; *Re Woodburn*, 1 D. & J. 333.

(*s*) *Re Chetwynd, Scarisbrick* v. *Nevinson*, [1902] 1 Ch. 692.

(*t*) *Talbot* v. *Earl Radnor*, 3 My. & K. 252; *Goodson* v. *Ellison*, 3 Russ. 583; and as to summons, R. S. C. 1883, Ord. LV. r. 3.

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But it is not obligatory on the court to make an order for administration, if the questions between the parties can be properly determined without it (*u*).

(2) Where, however, the equities are perfectly clear and unambiguous (*x*), or the trustee merely craves to be released from caprice or laziness, or is otherwise not justified in the course he has pursued (*y*), he will have to pay all the costs. Even where he acts *bonâ fide*, but without any real cause, he will not be allowed his own costs (*z*); and where he brings an action when the same object might have been obtained by payment into court or by a summons in chambers (*a*), he will not be allowed the extra costs occasioned thereby (*b*). He will always appeal from an order of the court at his own risk (*c*).

When general administration will be ordered.

Actions for the administration of a trust are now comparatively rare. Formerly, a decree for general administration (that is to say, a decree whereby the court took upon itself to supervise the execution of the trust) was granted to a trustee or a beneficiary as a matter of course. The only check upon an abuse of the process of the court, was the rather remote contingency that the trustee might possibly be deprived of his costs, or, in very flagrant cases, have to pay the costs of all parties, upon the action coming on for further consideration. However, by the

(*u*) R. S. C. 1883, Ord. LV. r. 10; *Re Blake*, *Jones* v. *Blake*, 29 Ch. D. 913; *Re De Quetteville*, *De Quetteville* v. *De Quetteville*, 19 T. L. R. 383.

(*x*) *Re Knight*, 27 Beav. 45; *Lawson* v. *Copeland*, 2 B. C. C. 156; *Re Elliott*, 15 Eq. 194; *Re Foligno*, 32 Beav. 131; *Re Woodburn*, 1 D. & J. 333; *Beaty* v. *Curzon*, 7 Eq. 194; *Re Hoskin*, 5 Ch. D. 229.

(*y*) *Forshaw* v. *Higginson*, 20 Beav. 845; *Re Stokes*, 13 Eq. 333; *Re Cabburn*, *Gage* v. *Rutland*, 46 L. T. 848.

(*z*) *Re Leake*, 32 Beav. 135; *Re Heming*, 3 K. & J. 40; *Re Hodgkinson*, *Hodgkinson* v. *Hodgkinson*, [1895] 2 Ch. 190.

(*a*) *Re Giles*, 34 W. R. 712.

(*b*) *Wells* v. *Malbon*, 31 Beav. 48; but see *Smallwood* v. *Rutter*, 9 Hare, 24.

(*c*) *Rowland* v. *Morgan*, 13 Jur. 23; *Tucker* v. *Hernaman*, 4 De G. M. & G. 395.

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Rules of the Supreme Court, 1883, Ord. LV. r. 10, the old practice has been reversed; and it is now no longer obligatory upon the court or a judge to pronounce or make a judgment or order for the administration of any trust, if the questions between the parties can be properly determined on summons without such judgment or order, as mentioned in Article 66. The principles on which the court will, under this new rule, grant or refuse general administration, have been discussed in two cases; one before the late Mr. Justice PEARSON (*d*), and the other before the Court of Appeal (*e*), in which the learned Lords Justices were more inclined to restrict the right to a decree than Mr. Justice PEARSON was. Lord Justice COTTON in the latter case said: "Formerly, if anyone interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and as a matter of course obtained, the full decree for the administration of the estate; and the court, even if it thought that, although there were really questions which required decision, these questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the question. Now, however, the practice is laid down by r. 10 of Ord. LV., as follows:—" (His lordship here read the rule and continued) "Where there are questions which cannot properly be determined without some accounts and inquiries or directions which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away, but the court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon, to be settled. That is the result of Ord. LV. r. 10. Then we have Ord. LXV. r. 1, which says, 'subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge.' These two rules must be read together, and we then

(*d*) *Re Wilson, Alexander* v. *Calder*, 28 Ch. D. 457.
(*e*) *Re Blake, Jones* v. *Blake*, 29 Ch. D. 913; and see also *Re Gyhon, Allen* v. *Taylor*, *ib.* 834.

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find this: that if a party comes and insists that there is a question to be determined, and, for the purpose of determining that question, asks for an administration judgment, the court cannot refuse the judgment unless it sees that there is no question which requires its decision. But r. 1 of Ord. LXV. puts the party who applies for the judgment and insists upon it in this position—that if it turns out that what has been represented as the substantial question requiring adjudication is one which was not a substantial question, or that the applicant was entirely wrong in his contention as to that particular question, the court can, and, in my opinion, ought ordinarily to make the person who gets the judgment pay the costs of all the proceedings consequent upon his unnecessary, or possibly vexatious, application to the court" (*f*).

Deductions from Lord Justice COTTON'S judgment.

It will be seen from the above judgment, that now that almost all isolated questions of construction or administrative difficulty can be dealt with singly, very few cases can arise necessitating general administration; except (1) where the trustees cannot pull together, or (2) the circumstances of the estate give rise to ever recurring difficulties requiring the frequent direction of the court, or (3) where a *primâ facie* doubt is thrown on the *bona fides*, or the discretion of one or more of the trustees. Possibly, also, it would still be held that a trustee would be entitled to a judgment for general administration to relieve him of trouble and annoyance, in a case such as the following, viz., where there were divers disputes as to the proper beneficiaries, out of which disputes several actions had sprung, to all of which the trustee was a necessary defendant (*g*). For if he brings the money into court under the Act, he still remains a trustee; and though he would be under no liability *quoad* the fund brought in, he would not be discharged from liability *quoad* the past income. Moreover, he must be served with notice of all proceedings under the Act in relation to the fund and this of necessity would compel him to incur some expense in employing a solicitor.

(*f*) This seems to refer rather to the case of an action commenced by a beneficiary. It requires a very flagrant case to render a trustee liable to pay costs; see p. 323, *supra*.

(*g*) *Barker* v. *Peile*, 2 Dr. & Sm. 340.

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But where there is no dispute respecting the *amount* of a trust fund, and no justifiable ground for the trustee retiring from his office, the only doubt being as to the proper persons entitled; and the trustee, instead of paying the money into court under the Trustee Act, or issuing an originating summons, institutes a suit for the purpose of having the rights of the beneficiaries declared, he will be allowed such costs only as he would have been entitled to if he had paid the fund into court under the Act (*h*), or had issued a summons (*i*).

It has also been held that the court will not necessarily order general administration because a testator has directed his trustees to commence an action for it (*k*). For the court is for the benefit of the living and not the dead.

(*h*) *Wells* v. *Malbon*, 31 Beav. 48.
(*i*) *Re Giles*, 34 W. R. 712.
(*k*) *Re Stocken, Jones* v. *Hawkins*, 38 Ch. D. 319.

CHAPTER IX.

APPOINTMENT OF A JUDICIAL TRUSTEE.

ART. 69.—*Power of Court to Appoint.*

(1) Where application is made to the court (*a*) by or on behalf of the person creating or intending to create a trust (*b*), or by or on behalf of a trustee or beneficiary, the court may in its discretion appoint a person (called a judicial trustee) to be a trustee of that trust either jointly with any other person, or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (*c*).

(2) Any fit and proper person nominated in the application may be appointed. In the absence of such nomination, or if the court disapproves it (*d*), the official solicitor of the court, or some other person approved by the judge may be appointed (*e*). An unofficial judicial trustee must give security (*f*).

(3) Remuneration may be assigned by the court to the judicial trustee (*g*).

(*a*) The High Court or the Palatine Court (Judicial Trustees Act 1896 (59 & 60 Vict. c. 35), s. 2).

(*b*) The administration of the estate of a deceased is a trust, and his personal representative a trustee for the purposes of the Act (*ib.*, s. 1 (2)).

(*c*) Judicial Trustees Act, 1896, s. 1 (1).

(*d*) *Ib.*, s. 1 (3).

(*e*) Judicial Trustee Rules, 1897, r. 7. *Douglas* v. *Bolam*, [1900] 2 Ch. 749.

(*f*) Judicial Trustees Act, 1896, s. 4 (1), and Judicial Trustee Rules, r. 9.

(*g*) Judicial Trustees Act, 1896, s. 1 (5).

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(4) Once in every year the accounts of a judicial trustee have to be audited by an officer of the court, or a professional accountant appointed by the court (*h*).

(5) The court may direct an inquiry into the administration of the trust by the judicial trustee (*i*), and may give any special or general directions in regard to the trust or its administration (*k*).

(6) In all cases a judicial trustee is to be subject to the control and supervision of the court as an officer thereof (*l*).

Illustrations.

This Act was a new departure in English law, founded on the analogy of the law of Scotland, where a "Judicial Factor" has been established for many years. Its object is to give to trust property the same protection as would be given by a general administration order, but at less cost, and without the necessity of making numerous applications to the court. This protection is secured (1) by the appointment of an official, or, (2) in the alternative, of a person who gives security for his honesty, and (3) by having the accounts audited once a year. It does not, however, appear that if an official judicial trustee should commit a breach of trust (innocent or otherwise), the beneficiaries would be indemnified by the Government.

The power of the court to appoint is purely discretionary, and will not be exercised, if the application is opposed, where no charge of improper conduct is made against an existing trustee, even where he or she is a sole trustee (*m*); nor where the donee of the power of appointing trustees has appointed

(*h*) Judicial Trustees Act, 1896, s. 1 (6), and Judicial Trustee Rules, r. 14.
(*i*) Judicial Trustees Act, 1896, s. 1 (6).
(*k*) *Ib.*, s. 1 (4).
(*l*) *Ib.*, s. 1 (3).
(*m*) *Re Ratcliffe*, [1898] 2 Ch. 352.

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persons able and willing to act (*n*); nor will the court as a rule appoint a judicial trustee to act with a private one (*o*).

In compliance with s. 4 of the Act, a code of thirty-five rules was made in 1897, dealing in detail with the appointment of official and non-official judicial trustees, the administration of the trust, the security to be given, the custody of securities and money, accounts and audit remuneration, removal, suspension, resignation and discontinuance of judicial trustees, the communication between judicial trustees and the court, fees and so on. As, however, these rules will be found set out in the "Yearly Practice," it is not thought necessary to call further attention to them here.

(*n*) *Re Chisholm*, 43 Sol. J. 43.
(*o*) See also *Re Martin*, [1900] W. N. 129.

DIVISION V.

THE CONSEQUENCES OF A BREACH OF TRUST.

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CHAPTER I.

THE LIABILITY OF THE TRUSTEES.

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ART. 70.—*The Measure of the Trustee's Responsibility.*

(1) The general measure of a trustee's responsibility for a breach of trust, is the amount by which the trust property has been depreciated, together with any interest which he has received, or which the court is justly entitled to say he

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ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not(*a*). In applying this principle:

(a) the rate of interest which a trustee ought to have received will be usually 3 per cent. simple interest (*b*); unless it was his duty to accumulate, when it will be compound interest, with yearly or even half-yearly rests (*c*).

(b) But where a trustee keeps trust money in his own hands, intending to appropriate it, the rate will be 5 per cent. (*d*).

(c) And where a trustee employs trust money in trade or speculation (whether fraudulently or with the view of benefiting the beneficiaries (*e*)), he will be liable (at the option of the beneficiaries), either (1) to pay interest at 5 per cent. (*e*) (or even compound interest, with yearly or half-yearly (*f*) rests, if he may reasonably be presumed to have made compound interest), *or* alternatively (2) to account for all the profits made by him (*f*).

(*a*) See *Attorney-General* v. *Alford*, 4 D. M. & G. 851; *Stafford* v. *Fiddon*, 23 Beav. 386; *Vyse* v. *Foster*, 8 Ch. App. 309. affirmed 7 H. L. Cas. 318; *Burdick* v. Garrick, 5 Ch. App. 233; and *Hale* v. *Sheldrake*, 60 L. T. 292; but see *Ex parte Ogle*, 8 Ch. App. 711, which, however, seems to be quite inconsistent with all the other authorities, as the trustee did not receive interest, nor was there any evidence that he ought to have received the rate (5 per cent.) charged against him.

(*b*) Cases cited in note (*a*), and also *Jones* v. *Foxall*, 15 Beav. 388.

(*c*) *Re Barclay*, *Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Re Emmet*, *Emmet* v. *Emmet*, 17 C. D. 142; *Attorney-General* v. *Alford*, *supra*; *Stafford* v. *Fiddon*, *supra*; *Price* v. *Price*, 42 L. T. 636.

(*d*) See and consider judgments, *Attorney-General* v. *Alford*, *supra*; *Jones* v. *Foxall*, *supra*; *Berwick* (*Mayor of*) v. *Murray*, 7 D. M. & G. 497.

(*e*) See *Re Davis*, *Davis* v. *Davis*, [1902] 2 Ch. 314.

(*f*) See *Jones* v. *Foxall*, *supra*; *Vyse* v. *Foster*, *supra*; *Burdick* v. *Garrick*, *supra*; *Robinson* v. *Robinson*, 1 D. M. & G. 247, 257; *Re Davis*, *Davis* v. *Davis*, *supra*.

(2) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security is deemed an authorised investment for the smaller sum; and the trustee is only liable to make good the sum advanced in excess thereof with interest (*g*). Art. 70.

PARAGRAPH (1).

Loss of capital caused by disobeying the directions of the settlement.

For a good example of the measure of the trustee's liability for disregarding the express directions of the settlement, the reader is referred to p. 169, *supra*. Another (which seldom occurs now) happens where trustees are *expressly directed* to invest in particular securities (*e.g.*, British Government funds), and, instead of doing so, retain the money in their hands. In such cases the beneficiaries may elect either to claim the money itself, *or* the amount of Government stock which the trustees might have purchased therewith at the date when they ought to have made the investment (*h*). However, where trustees have a *choice of investments*, it is obvious that the same rule cannot apply, because it would be impossible to say which of them they would have chosen if they had exercised their discretion. In such cases, therefore, the beneficiaries are only entitled to the money with interest at 3 (*i*) per cent. (*k*).

Not liable for increased value caused by act of third party after breach.

The trustee of gas shares allowed the husband of one of the beneficiaries to get them into his hands. The husband surrendered them to the company, accepting allotments of new shares in their stead, on which new shares he paid calls, and

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 9. See *Waite* v. *Parkinson*, 85 L. T. 456, where the court left the trustee to pay his own costs. This section applies to investments made as well before as after the commencement of the Act, except where an action or other proceeding was pending with reference thereto, on December 24th, 1888. Prior to the latter date the trustee had to take over the mortgage and to pay the actual money invested.

(*h*) *Shepherd* v. *Mould*s, 4 Hare, 500, 504.

(*i*) *Re Barclay*, *Barclay* v. *Andrew*, [1899] 1 Ch. 674.

(*k*) *Robinson* v. *Robinson*, 1 D. M. & G. 247; *Marsh* v. *Hunter*, 6 Madd. 295.

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finally became bankrupt. On these facts, it was held that the trustee was only liable for the value of the shares, less the calls paid by the husband, that being the true measure of the loss to the trust (*l*).

Cases where there must always have been a loss.

So, where there must always have been a loss on the realisation of trust property, apart from any breach of trust, then if a breach of trust further depreciates it, the measure of the trustee's responsibility is confined to the further depreciation; and he is not responsible for the difference between the nominal value and the actual amount realised (*m*).

Loss of interest caused by unreasonable delay in investing.

A trustee who is guilty of unreasonable delay in investing trust funds will be answerable to the beneficiaries for simple interest at 3 (*n*) per cent. during the continuance of such delay (*o*); for if he had done his duty, interest would in fact have been received.

Duty to accumulate.

On the same ground, where an executrix allowed trust money to remain uninvested in her solicitor's hands for nine years during the infancy of the beneficiary, she was charged with compound interest at the rate of 3 per cent. per annum, with half-yearly rests: as it was her duty to have accumulated the income, by investing it from time to time in consols (*p*). And *à fortiori* is this the case where there is an express trust for accumulation (*n*).

Improper calling in of good security.

So, a trustee who, without proper authority, calls in trust property invested on mortgage at 5 per cent., would be liable for that rate of interest; for although he may not actually have received that rate, he would have done so (*q*) but for his unauthorised act.

(*l*) *Briggs* v. *Massey*, 30 W. R. 325; and see also *Re Hulkes, Powell* v. *Hulkes*, 33 Ch. D. 552.

(*m*) *Lord Gainsborough* v. *Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991.

(*n*) See *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Re Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Hill's Trusts, Hill* v. *Equitable, etc., Society*, 75 L. T. 477; *Re Lynch Blosse, Rickards* v. *Lynch Blosse*, [1899] W. N. 27.

(*o*) *Stafford* v. *Fiddon, supra.*

(*p*) *Gilroy* v. *Stephen*, 30 W. R. 755 (FRY, J.); and see also *Re Emmet, Emmet* v. *Emmet*, 17 Ch. D. 142.

(*q*) See judgment in *Jones* v. *Foxall, supra*; and see principles stated in *Re Massingbird, Clark* v. *Trelawney*, 63 L. T. 296; and *Mosley* v *Ward*, 11 Ves. 581.

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Mixing trust funds with trustee's own moneys, without fraud.

The above examples relate to honest breaches of trust and are based on the actual amount of loss. But if a trustee keeps the money fraudulently in his hands, meaning to appropriate it, the actual loss ceases to be the measure of his responsibility. As Lord CRANWORTH said in the leading case of *Attorney-General* v. *Alford* (*s*), "in such a case, I think the court would be justified in dealing, in point of interest, very hardly with an executor; *because it might fairly infer that he used the money in speculation, by which he either did make 5 per cent., or ought to be estopped from saying that he did not.* The court would not inquire what had been the actual proceeds, but in application of the principle, *in odium spoliatoris omnia præsumuntur*, would assume that he did make the higher rate, *that is, if that were a reasonable presumption.*"

Solicitor-trustee using trust funds in his business.

In *Burdick* v. *Garrick* (*t*), a solicitor, as the agent of the plaintiff, held a power of attorney from him, under the authority of which he received divers sums of money, and paid them into the bank to the credit of his (the solicitor's) firm. On a bill being filed by the client for an account, the Vice-Chancellor made a decree for payment of the principal with *compound interest.* The Court of Appeal, however, reversed this decision, Lord HATHERLEY saying: "The Vice-Chancellor has directed interest to be charged at the rate of 5 per cent., which appears to me to be perfectly right, and for this reason, that the money was retained in the defendants' own hands, and was made use of by them. That being so, the court presumes the rate of interest made upon money to be the ordinary rate of interest, viz., 5 per cent. I cannot, however, think the decree correct in directing half-yearly rests; because the principle laid down in the case of *Attorney-General* v. *Alford* appears to be the sound principle, namely, that the court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money, by directing rests, or payment of compound interest, but proceeds upon this principle,

(*s*) *Supra;* and see *Re Jones, Jones* v. *Searle*, 49 L. T. 91; *Re Emmet, Emmet* v. *Emmet*, 17 Ch. D. 142; and *Re Davis, Davis* v. *Davis, supra.*

(*t*) 5 Ch. App. 233. See also *Hale* v. *Sheldrake*, 60 L. T. 292, where a husband of the tenant for life was ordered to replace a trust fund, but without interest, as the wife had allowed him to receive the income.

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that either he has made, or has put himself into such a position that he is presumed to have made, 5 per cent., or compound interest, as the case may be." His lordship then pointed out that no doubt where a trustee employs money in ordinary trade, he will be made liable for compound interest, because trade capital is presumed to yield it; but that that reason had no application to capital employed in a solicitor's business, upon which a solicitor is frequently receiving no interest at all.

Five per cent. still charged against trustee using money.

It will be perceived that in the last cited judgment the learned V.-C. gave 5 per cent. interest, explaining that the court presumed that to be the "ordinary rate." But in the recent case of *Re Davis, Davis* v. *Davis* (*x*), FARWELL, J., gave 5 per cent. (although he admitted that it was no longer the mercantile rate) the money having been employed in the trustee's trade. In that case compound interest was not asked for; probably because the circumstances showed that it had not been earned.

Partner-trustee allowing trust fund to remain in business.

However, in order to charge a trustee with compound interest, or with actual profits for employing the trust funds in trade, there must be an active calling in of the trust moneys for the purpose of embarking them in the trade or speculation; a mere neglect to withdraw funds already embarked by the settlor in the trustee's trade, is not sufficient (*y*).

PARAGRAPH (2).

Liability for loss caused by insufficient mortgage security.

Prior to the Trustee Act, 1888 (51 & 52 Vict. c. 59), where a trustee invested the trust fund on mortgage, and advanced more than two-thirds of the value, that *primâ facie* constituted *the entire investment* a breach of trust. It was not an investment which the trustee ought to have made at all, and consequently having, by making it, committed a breach of trust, the whole item—the entire sum so invested—was disallowed him in his accounts, and the mortgage was either realised and he was charged with the actual deficiency, or (at all events where the security was wholly unauthorised and not merely deficient (*z*)) he was directed to replace the entire sum, and

(*x*) [1902] 2 Ch. 314.
(*y*) *Vyse* v. *Foster*, 8 Ch. App. 309, affirmed L. R. 7 H. L. 318.
(*z*) *Re Salmon, Priest* v. *Uppleby*, 42 Ch. D. 351.

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upon doing so the mortgage became his absolutely (*a*). Consequently, although a trustee might only have erred in advancing, say one-eighth more than two-thirds of the value, he thereby became liable to repay to the estate the whole of the amount invested, recouping himself so far as possible out of the mortgage. But although this is still the rule with regard to securities generally, it is no longer so with regard to mortgage securities where the only breach of trust was that *too much* was advanced. In such cases s. 9 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (re-enacting s. 5 of the Act of 1888), provides, that where the *mortgage security* "*would at the time of the investment be a proper investment in all respects for a smaller sum*," he will only be liable for the excess over that smaller sum, although that may not represent the loss to the estate. A trustee is not, however, protected by this enactment where he ought not to have invested on the security of such property at all, *e.g.*, where he has invested on mortgage of leaseholds, or of trade property, or wasting property, such as mines or brickfields or the like (*b*). In such a case if the trustee in fault retires, the new trustees need not put him to his election to take over the security, but may realise the security without notice to him, and charge him with the entire deficiency (*c*), or (if he has become bankrupt) prove for it (*d*).

Rule only applies where the breach is solely as to the amount advanced.

This, however, is not so where the security is one of a class not authorised at all. In such cases, unless the beneficiaries are under disability (*e*), they must give the trustee the option of taking over the security before realising it (*f*).

(*a*) *Fry* v. *Tapson*, 28 Ch. D. 268; *Re Whiteley*, *Whiteley* v. *Learoyd*, 33 Ch. D., at p. 354.

(*b*) *Re Walker*, *Walker* v. *Walker*, 59 L. J. Ch. 386. And see also *Head* v. *Gould*, [1898] 2 Ch. 250.

(*c*) *Re Salmon*, *Priest* v. *Uppleby*, 42 Ch. D. 351.

(*d*) *Re Lake*, *Ex parte Howe*, [1903] 1 K. B. 439; where the mortgage was a contributory one, and the mortgagor brought an action to set it aside for fraud, which action the beneficiaries compromised behind the back of the trustee.

(*e*) *Head* v. *Gould*, [1898] 2 Ch. 250.

(*f*) *Re Salmon*, *Priest* v. *Uppleby*, *supra*.

Art. 71.

ART. 71.—*The Liability, Joint and Several.*

Each trustee is in general liable for the whole loss when caused by the joint default of all the trustees, even although all may not have been equally blameworthy (*g*); and a decree against all may be enforced against one or more only (*h*).

All parties to breach are equally liable

All parties to a breach of trust are equally liable, and there is between them no primary liability (*i*); and this liability is not confined to express trustees, but extends to all who are actually privy to the breach of trust. Thus, where trustees delegated their trusteeship to their solicitors, who received the moneys, and did not invest them, but made use of them in their business, it was held that both the trustees and the solicitors were equally liable, and that judgment might be levied by the beneficiaries against the solicitors only (*k*). This principle does not, however, apply to professional payments made by trustees to a solicitor or other agent who knows that the money is trust money, unless facts are brought home to him which show that, to his knowledge, the money was being applied in a manner inconsistent with the trust; or, in other words, that the solicitor or other agent was party either to a fraud, or to a breach of trust on the part of the trustees. As Mr. Justice (now Lord Justice) STIRLING put it: "To make an agent liable to return costs, he must be fixed with notice that, at the time when he accepted payment, the trustee had been guilty of a breach of trust such as would preclude him altogether from resorting to the trust estate for payment of costs; so that in fact the application of the trust estate in payment of costs would be a breach of trust" (*l*).

(*g*) *Wilson* v. *Moore*, 1 My. & K. 126; *Lyse* v. *Kingdon*, 1 Coll. 184; *Ex parte Norris*, 4 Ch. App. 280. This applies not only to express trustees but to all persons who meddle with the trust property with notice of the trust. See *Cowper* v. *Stoneham*, 68 L. T. 18.

(*h*) *Attorney-General* v. *Wilson*, Cr. & Ph. 28; *Fletcher* v. *Green*, 33 Beav. 426.

(*i*) *Per* Master of the Rolls, in *Wilson* v. *Moore*, 1 My. & K. 126.

(*k*) *Cowper* v. *Stoneham*, 68 L. T. 18; and see also *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, and Art. 81, *infra*, where the liability of third parties is more fully discussed.

(*l*) *Re Blundell, Blundell* v. *Blundell*, 40 Ch. D. 370.

Art. 72.

Art. 72.—*No Set-off allowed of Gain on one Breach against Loss on another.*

A trustee is only liable for the actual loss in each distinct and complete transaction which amounts to a breach of trust, and not for the loss in each particular item of it (*m*). A loss in one transaction or fund is not, however, compensated by a gain in another and distinct one (*n*).

Where breach of trust causes benefit to the estate, not liable for outlay.

In *Vyse* v. *Foster* (*m*), a testator devised his real and personal estates upon common trusts for sale, making them *a mixed fund*. His trustees were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that, to develop their value, it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1,600 out of the testator's personal estate. The evidence showed that the outlay had benefited the estate, but Vice-Chancellor Bacon disallowed the £1,600 to the trustees in passing their accounts. The Court of Appeal (and subsequently the House of Lords), however, reversed this, the Lord Justice James saying: "As the real and personal estate constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, *bonâ fide* laid out on other part of the estate, in the exercise of their judgment as the best means of increasing the value of the whole."

Loss on one transaction cannot be set-off against gain on another.

In *Wiles* v. *Gresham* (*o*), on the other hand, by the negligence of the trustees of a marriage settlement, a bond debt for £2,000 due from the husband was not got in, and was totally lost. Certain other of the trust funds were without proper authority invested in the purchase of land upon the trusts of the settlement. The husband, out of his own money, greatly added to the value of this land; and upon a claim being made against the trustees for the £2,000 they endeavoured to set-off

(*m*) *Vyse* v. *Foster*, 8 Ch. App. 309, affirmed 7 H. L. 318.
(*n*) *Wiles* v. *Gresham*, 2 Drew. 258; *Dimes* v. *Scott*, 4 Russ. 195; *Ex parte Lewis*, 1 G. & J. 69.
(*o*) 2 Drew. 258. *Re Barker, Ravenshaw* v. *Barker*, 77 L. T. 712.

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against that loss the gain which had accrued to the trust by the increased value of the land; but their contention was disallowed, the two transactions being separate and distinct.

Again, trustees had kept invested on unauthorised security a sum of money which they ought to have invested in consols, and which was in consequence depreciated. Eventually part of the money was invested in consols, at a far lower rate than it would have been if invested according to the directions in the will. The trustees claimed to set-off the gain against the loss; but were not allowed to do so, because "at whatever period the unauthorised security was realised, the estate was entitled to the whole of the consols that were then bought, and if it was sold at a later period than it ought to have been, the executor was not entitled to any accidental advantage thence accruing" (*p*). This case is at first sight difficult to be distinguished from *Vyse* v. *Foster*, but it will be perceived that the loss and gain resulted from two distinct transactions. The loss resulted from a breach of trust in not realising the securities; the gain arose from a particular kind of stock being at a lower market value than usual at the date at which the trustees bought it. Still it may be reasonably doubted whether it would be followed at the present day.

Where, however, trustees committed a breach of trust in lending trust moneys on mortgage; and upon a suit by them the mortgaged property was sold, and the money paid into court, and invested in consols pending the suit, and the consols rose in value, the trustees were allowed to set-off the gain in the value of the consols against the loss under the mortgage; for the gain and loss arose out of one transaction (*q*). It is however, very difficult to reconcile this case with the last one, but it seems to be reasonable and in accordance with common sense.

(*p*) *Dimes* v. *Scott*, 4 Russ. 195.
(*q*) *Fletcher* v. *Green*, 33 Beav. 426.

Art. 73.

Art. 73.—*Property acquired either wholly or partly out of Trust Property becomes liable to the Trust.*

(1) If a trustee has, in breach of trust, converted trust property into some other form, the property into which it has been so converted, becomes subject to the trust. If *all* the beneficiaries are *sui juris*, they can collectively elect to adopt the breach, and take the property as it then stands; but if one of them objects to do so, he may require it to be reconverted. In that case any gain accrues to the trust estate, and any loss falls on the trustee (*r*).

(2) If a trustee has mixed trust moneys with his own, or has, partly with his own and partly with trust moneys, purchased other property, then the beneficiaries cannot elect to take the whole of the mixed fund or the entire property so purchased. If, however, the mixed fund can be traced (into whatever form it may have been converted), the beneficiaries will be entitled to a first charge on it (*s*).

Paragraph (1).

Stock bought with trust money.

Thus, where money is handed to a broker for the purpose of purchasing stock, and he invests it in unauthorised stock, and absconds; the stock which he has purchased will belong to the principal, and not to the broker's trustee in bankruptcy. For a broker is a constructive trustee for his principal; and, as was said by Lord Ellenborough, "the property of a principal,

(*r*) See *per* Pearson, J., *Re Patten and Edmonton Union*, 31 W. R. 785; *Re Hallett. Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Taylor* v. *Plumer*, 3 M. & S. 562; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Hopper* v. *Conyers*, 2 Eq. 549; *Lane* v. *Dighton*, Amb. 409; *Scales* v. *Baker*, 28 Beav. 91; *Cook* v. *Addison*, 7 Eq. 466; *Ernest* v. *Croysdill*, 2 D. F. & J. 175; *Ex parte Barker*, 28 W. R. 522.

(*s*) *Re Hallett, Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Re Oalway, Hertslett* v. *Oatway*, [1903] 2 Ch. 356; *Lupton* v. *White*, 15 Ves. 432; *Pennell* v. *Deffell*, 4 D. M. & G. 372; and see also *Re Pumphrey, Worcester, etc. Banking Co.* v. *Blick*, 22 Ch. D. 255, cited *supra*, p. 354.

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entrusted by him to his factor for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in form, so long as such property is capable of being identified and distinguished from all other property "(*t*).

Money produced by trust chattels.

So, if goods consigned to a factor be sold by him and reduced into money, yet if the money can be traced—as, for instance, where it has been kept separate and apart from the factor's own moneys, or kept in bags, or the like (*u*), or has been changed into bills or notes (*x*), or into any other form (*y*), or has been paid into the factor's account at the bank (*z*)—the employer, and not the creditors of the factor, will, upon his bankruptcy, be entitled to the property into which it has been converted. For the creditors of a defaulting trustee can have no better right to the trust property than the trustee himself. It makes no difference in this respect that the trustee committed a breach of trust in converting the property; for an abuse of trust can confer no right on the person abusing it, nor on those claiming through him (*a*).

Sale by trustees of property wrongfully acquired out of trust moneys.

So, where the trustees of a will invested trust moneys in an unauthorised purchase of land, and afterwards contracted to sell it for a largely increased price, it was held that they were acting properly in so doing, and that the concurrence of one beneficiary was sufficient to make a good title, on the purchasers seeing that the purchase-money was invested in the names of the trustees as trustees (*b*). For, as Mr. Justice PEARSON put it: "I see no reason why the trustees should not now do what it was all along their duty to do, and what the court would have ordered them to do. At the same time, I agree that it would be proper to take the concurrence of one of the *cestuis*

(*t*) *Taylor* v. *Plumer*, *supra*; *Ex parte Cooke*, 4 Ch. D. 123; *Re Hallett, Knatchbull* v. *Hallett*, 13 Ch. D. 696.
(*u*) *Tooke* v. *Hollingworth*, 5 T. R. 215.
(*x*) *Ex parte Dumas*, 2 Ves. sen. 582.
(*y*) *Frith* v. *Cartland*, 2 Hem. & M. 417; *Birt* v. *Burt*, 11 Ch. D. 773 n.
(*z*) *Re Hallett, Knatchbull* v. *Hallett*, *supra*.
(*a*) *Taylor* v. *Plumer*, *supra*.
(*b*) *Re Patten and Edmonton Union*, 31 W. R. 785. Although, until recently, this was the only reported case on the subject, it has been very frequently followed in judges' chambers.

que trusts; because, if all of them elected to take their shares of the land after it had been purchased, they would have been entitled to do so. But if one of them objected to take the land, but required that it should be sold, then the others could not compel him to take his share of the land as representing his share of the money." Art. 73.

On the same principle, where the beneficiaries or any of them are infants the trustees can sell without anyone's consent; because in that case the beneficiaries collecting are not in a position to adopt the breach (*c*).

PARAGRAPH (2).

Trust property mixed with other property so as to be untraceable.

The case is comparatively simple where (as in the foregoing illustrations) the trustee has spent or converted the trust property, and nothing but the trust property. It becomes more difficult, however, when the trustee has mixed the trust moneys with his own, and either kept the mixed fund, or spent it in the purchase of other property. The case then turns entirely upon the question, whether the mixed fund, so formed, can be identified; or, if it has been spent, whether it can be traced into the property which has been purchased with it. If it has become so mixed up with the trustee's private property as to render it impossible to trace it (for instance, where it has been converted into money, which has been put into circulation (*d*), or has otherwise become indistinguishable), then, as the actual property is gone, and that which stands in its place cannot be identified, the beneficiary can only proceed against the trustee personally for the breach of trust, or, if the latter be bankrupt, can only prove as a creditor (*e*). For the right of the beneficiary is only to have the actual trust property or that which stands in its place, or to have a charge on it.

Trust property mixed with other

But where the mixed fund can be traced (as, for instance, where the trustee has paid in the trust fund to his general

(*c*) *Re Jenkins & Randall*, [1903] 2 Ch. 362; and see *Power* v. *Banks*, [1901] 2 Ch. 489, at p. 496.

(*d*) *Miller* v. *Race*, 1 Burr. 457.

(*e*) *Ex parte Dumas*, 1 Atk. 232; *Scott* v. *Surman*, Willes, 404; *Re Hallett, Ex parte Blane*, [1894] 2 Q. B. 237.

Art. 73. property which can be traced.

banking account (*f*)), the beneficiaries will have a charge, or lien, upon the whole mixed fund. In the case of *Re Hallett, Knatchbull* v. *Hallett* (*f*), the late Sir GEORGE JESSEL, M.R., elaborately reviewed all the authorities touching on this question. His lordship said: "Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns. But if, instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person you can follow it. If in the case supposed the trustee had lent the £1,000 to a man without security, you could follow the debt and take it from the debtor. . . . If instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1,000, the only difference is this, that instead of taking the debt, the *cestuis que trusts* would have a charge for the amount of the trust money on the debt."

Again, a trustee paid trust money into his current account, and out of money drawn upon that account, purchased an investment in his own name, but subsequently applied the balance to his own purposes. It was held that his representatives were not entitled to maintain that the investment was purchased out of the trustee's own money, and that what he had subsequently spent was the trust money (*g*).

A judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the

(*f*) *Re Hallett, Knatchbull* v. *Hallett*, 13 Ch. D. 696, overruling the decision of FRY, J., in *Ex parte Dale*, 11 Ch. D. 772. But *cf.* and dist. *Re Hallett, Ex parte Blane, supra*, and *Ex parte Fitzsimon*, 25 L. R. Ir. 24.

(*g*) *Re Oatway, Hertslet* v. *Oatway*, [1903] 2 Ch. 356; treating *Brown* v. *Adams*, 4 Ch. App. 764, as overruled.

broker. All moneys in the bank to the broker's credit, *were, in fact, moneys received for clients.* Since money of a client had been paid in, drawings out in excess of the then balance had been made. And so in the case of another client. Except those two, there was no client who claimed any part of the fund:—*Held*, on appeal, that as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance (*h*). Where, however, a trustee has overdrawn his banking account, his bankers have a first and paramount lien on all moneys paid in if they have no notice that they are trust moneys (*i*): for where the equities are equal the law prevails, and, in the case supposed, the bankers have in point of law received the money in payment of their debt.

Again, trustees had power, with the consent of the tenant for life, to sell the trust property, and they were directed to invest the purchase-money in the purchase of other real estate, to be settled on the like trusts. The trust property was sold under this power for £8,440, and the tenant for life was allowed (wrongly) to keep the purchase-money. About the same time he purchased another estate for £17,400, of which sum £8,124 was part of the above-mentioned trust money. This estate was conveyed to him in fee simple. The tenant for life ultimately became bankrupt, and it was held that, as against his assignees in bankruptcy, the original trustees of the settlement had a lien on the estate which he had purchased, to the extent of the moneys invested in its purchase (*k*).

No lien unless it can be shown that trust fund forms part of

However, wherever the trustee has mixed the trust fund with his own moneys, then, before a charge or lien can be substantiated, it must be shown that the trust fund in fact forms part of the fund or property on which the lien is claimed.

(*h*) *Hancock* v. *Smith*, 41 Ch. D. 456. And see *Mutton* v. *Peate*, [1900] 2 Ch. 79. But *cf. Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433, where *Hancock* v. *Smith* was distinguished.

(*i*) *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; and see also the still stranger case of *Coleman* v. *Bucks, etc. Bank*, [1897] 2 Ch. 243, where the bank seems to have had notice that the fund was affected with a trust of some kind.

(*k*) *Price* v. *Blakemore*, 6 Beav. 507; and see also *Hopper* v. *Conyers*, 2 Eq. 549; *Middleton* v. *Pollock*, 4 Ch. D. 49; and *Cook* v. *Addison*, 7 Eq. 466.

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a specific fund or property.

Where, therefore, it appeared that the actual bank notes, of which the trust fund consisted, had not been paid by the trustee into his banking account, it was held that the *cestuis que* trusts had no lien on the balance lying at the trustee's banker's, because the trust fund could not be traced to the bank (*l*). Of course, if the trust fund could have been proved to have been paid into the trustee's account, then, notwithstanding that he might subsequently have drawn out and paid in moneys, the lien would have been upheld.

ART. 74.—*Any of the Beneficiaries may compel Performance of a neglected Duty or prevent the Commission of Breach.*

Where the court is satisfied that trust property is in danger—

(a) by reason of the active (*m*) or passive (*n*) misconduct of the trustees; or

(b) by reason of the trustees residing out of the jurisdiction of the court (*o*);

an injunction will be granted at the instance of any person with an existing, vested or contingent interest (*p*), either compelling the trustees to do their duty (*q*), or restraining them from interfering with the trust property (*m*), as the case

(*l*) *Ex parte Hardcastle*, 29 W. R. 615. If it cannot be traced, yet if the trustee has repaid the amount to the trust, it will not be a fraudulent preference although he may forthwith become bankrupt; *Sharp* v. *Jackson*, [1899] A. C. 419.

(*m*) *Earl Talbot* v. *Scott*, 4 K. & J. 139; *Middleton* v. *Dodswell*, 13 Ves. 266; *Dance* v. *Goldingham*, 8 Ch. App. 902.

(*n*) *Foley* v. *Burnell*, 1 B. C. C. 274; *Fletcher* v. *Fletcher*, 4 Hare, 67.

(*o*) *Noad* v. *Backhouse*, 2 Y. & C. C. C. 529.

(*p*) Lew. 697; *Scott* v. *Becher*, 4 Pr. 346; but see as to contingent *cestuis que trusts*, *Davis* v *Angel*, 10 W. R. 722; *Clowes* v. *Hilliard*, 4 Ch. D. 413; *Re Parsons*, *Stockley* v. *Parsons*, 45 Ch. D. 51; and *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648.

(*q*) See note (*n*), *supra*.

may require; and, if expedient, a receiver will be appointed (*r*). Art. 74.

Right to use name of trustee in action at law.

Thus, if one commits some trespass upon lands in the possession of the trustee, and the latter refuses to sue him, the court will oblige him to lend his name for that purpose, on receiving a proper indemnity from the beneficiaries (*s*).

Trustee will be ordered to renew leases.

And so, if a tenant for life (who is a constructive trustee for this purpose) refuses to renew leaseholds, the court will compel him to do so, and a receiver of the income of the trust property will be appointed to collect a sufficient sum to pay the renewal fine (*t*).

Where same persons trustees under conflicting settlements.

In *Earl Talbot* v. *Scott* (*u*), lands were vested in trustees by Act of Parliament, upon trust for sale, and subject thereto, upon trusts inalienably annexing the rents to the earldom of Shrewsbury. The Earl of Shrewsbury attempted to disentail (which of course he could not do effectually), and demised the lands to the same trustees, upon trust for a particular claimant of the title. The trustees accepted this trust, and claimed to receive the rents in that character, pending proceedings by the plaintiff to establish his claim to the earldom. A receiver of the rents was, however, appointed on his application, upon the ground that the trusts of the will were in conflict with the prior trusts upon which they held the estate.

Beneficiaries may get a receiver appointed where property in danger.

The court will appoint a receiver and grant an injunction where, from the character or condition of the trustee, he is not a fit person to have the control of the trust property; as, for instance, where he is insolvent (*x*), or about to become bankrupt (*y*), or is a person of dissolute habits, or dishonest (*z*).

(*r*) See cases in note (*m*), and *Bennett* v. *Colley*, 5 Sim. 192.
(*s*) *Foley* v. *Burnell*, *supra*.
(*t*) *Bennett* v. *Colley*, *supra*, and Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19.
(*u*) *Supra*.
(*x*) *Mansfield* v. *Shaw*, 3 Madd. 100; *Gladdon* v. *Stoneman*, 1 Madd. 143 n., followed in *Bowen* v. *Phillips*, [1897] 1 Ch. 174.
(*y*) *Re H.'s Estate*, 1 Ch. D. 276.
(*z*) See *Everett* v. *Prytherch*, 12 Sim. 363.

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Injunction granted to restrain improper sale.

Again, the court will grant an injunction to restrain a sale by trustees at an undervalue (*a*) (although this was at one time doubted (*b*)).

ART. 75.—*Fraudulent Breach of Trust is a Crime.*

A trustee who *fraudulently* appropriates or disposes of the trust property, in any manner inconsistent with the trust, is guilty of a misdemeanour, and is liable to a maximum punishment of seven years penal servitude. No criminal proceedings can, however, be instituted without the sanction of the Attorney or Solicitor-General, or (if civil proceedings have been commenced) of the judge of the court wherein they have been commenced (*c*). The fact that a breach of trust is a crime, does not affect the validity of any civil proceeding, nor any agreement for restoration of the trust property (*d*).

(*a*) *Anon.*, 6 Madd. 10; and see *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Milligan* v. *Mitchell*, 1 My. & K. 446; *Dance* v. *Goldingham*, 8 Ch. App. 902.
(*b*) *Pechel* v. *Fowler*, 2 Anst. 549.
(*c*) 24 & 25 Vict. c. 96, s. 80.
(*d*) *Ib.*, s. 86.

CHAPTER II.

PROTECTION ACCORDED TO TRUSTEES IN CASE OF BREACH OF TRUST.

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ART. 76.—*General Protection where they have acted Reasonably and Honestly.*

If it appears to the court that a trustee (*a*) is or may be personally liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the breach or for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him, either wholly or partly, from personal liability for the same (*b*). The *onus* of proving honesty and reasonableness is cast upon the trustee (*c*), and is a question of fact depending on the circumstances of each case, no general principle or rule being possible (*d*).

Act requires reasonableness as well as honesty.

This is a new statutory rule introduced for the first time in the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35). It is

(*a*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3. It includes a judicial trustee.

(*b*) *Ib.* The Act is retrospective. The relief may be given without the Act being pleaded. *Singlehurst* v. *Tapscott, etc. Co.*, [1899] W. N. 133.

(*c*) *Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 583.

(*d*) *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; *Re Barker, Ravenshaw* v. *Barker*, 77 L. T. 712; *Re Stuart, Smith* v. *Stuart, supra.*

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not confined to judicial trustees, but is equally applicable to all trustees, and is retrospective (*e*). It will be perceived that two circumstances must co-exist to entitle a trustee to the benefit of the section, viz., he must have acted (1) honestly, and (2) reasonably. Honest folly is not excused (*f*).

Examples of unreasonable conduct.

Thus, where the breach of trust consists in investing the trust funds upon insufficient mortgage security, *primâ facie* the requirements of s. 8 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as to the employment of an independent surveyor constitute a standard by which the reasonable conduct is to be judged; although non-compliance with those requirements is not necessarily a fatal obstacle to an application for relief. It is also a matter of consideration whether the trustee would have acted in the same way if he had been lending money of his own. Where, therefore, the trustee acted on the valuation of a valuer employed by the solicitor *who acted for the mortgagors also*, and the valuation in one case merely stated the amount for which the property was a good security, without stating the value of the property itself, and in another, although the value was stated, the sum advanced exceeded two-thirds of that value, it was held that no relief could be given to the trustee (*g*).

So, again, where the trustee invested the trust fund on the security of a second mortgage he was not excused under this section (*h*).

So it has been held that a trustee does not act reasonably (however honest he may have been) in allowing his co-trustee to receive trust money without inquiry as to its application (*i*); or in allowing his co-trustee to act without check or inquiry (*k*), even where he is a solicitor who transacts the trust business (*l*). However, the above cases and those which follow, must only

(*e*) See s. 3 of the Act.

(*f*) *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; *Re Barker, Barcroft* v. *Barker*, 77 L. T. 712; *Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 583.

(*g*) *Re Stuart, Smith* v. *Stuart*, *supra*.

(*h*) *Chapman* v. *Browne*, [1902] 1 Ch. 785.

(*i*) *Wynne* v. *Tempest*, 13 T. L. R. 360.

(*k*) *Re Dulwich, etc. Society, Meall* v. *Pearce*, 68 L. J. Ch. 196.

(*l*) *Re Turner, Barker* v. *Ivimey*, *supra*; *Williams* v. *Byron*, 18 T. L. R. 172.

be taken as examples of the general trend of judicial opinion; for, in the words of Byrne, J., it is "impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and each case must depend upon its own circumstances" (*m*).

Examples of reasonable conduct.

On the other hand, a mistake of law in consequence of which leaseholds were sold, although there was no power of sale, has been held to be reasonable and excusable (*n*); and so has the payment by executors to their solicitor of money for the specific purpose of paying debts and administration expenses, which the solicitor misappropriated (*o*). Wilful default in not suing a debtor to the estate has been excused where the trustee had reasonable grounds for believing that proceedings would have been ineffectual (*p*); and also where the debt was small, and he reasonably believed that the debtor was a man of good credit, and that having regard to the testator's will, he was not bound to take proceedings (*q*).

So where a testator left an estate of £22,000, and it appeared that his debts only amounted to £100 or so, it was held that the executor acted reasonably in paying the widow an immediate legacy of £300, and in permitting her (under the trusts of the will) to receive so much of the income of the estate as was necessary for the maintenance of herself and family, before advertising for claims, although it subsequently turned out that there was a large claim for fraudulent misappropriation of rents received and not accounted for by the testator, which caused his estate to be insolvent (*r*). But the executor was not excused for allowing the widow to take the income after the claimant had issued his writ: and, apparently, the learned judge (Romer, J.) felt considerable doubts as to whether he ought to have excused payment of income after the executor had notice of the claim.

(*m*) *Per* Byrne, J., *Re Turner*, *Barker* v. *Ivimey*, *supra*, and *per* Romer, J., *Re Kay*, *Mosley* v. *Kay*, [1897] 2 Ch., at p. 524.
(*n*) *Perrins* v. *Bellamy*, [1898] 2 Ch. 521.
(*o*) *Re Lord de Clifford*, *de Clifford* v. *Quilter*, [1900] 2 Ch. 707.
(*p*) *Re Roberts*, *Knight* v. *Roberts*, 76 L. T. 479.
(*q*) *Re Grindey*, *Clews* v. *Grindey*, [1898] 2 Ch. 593.
(*r*) *Re Kay*, *Mosley* v. *Kay*, [1897] 2 Ch. 518.

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ART. 77.—*Statute of Limitations.*

(1) "In any action or other proceeding against a trustee (*s*) or any person claiming through him (*t*), except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

(a) "All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him :

(b) "If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married

(*s*) Does not apply to a trustee in bankruptcy (*Re Cornish*, [1896] 1 Q. B. 99), but does apply to a director of a company (*Re Lands Allotment Co.*, [1894] 1 Ch. 616, and *Whitwam* v. *Watkin*, 78 L. T. 188).

(*t*) This does not apply to an action against beneficiaries by third parties on the ground that they claim through a trustee (*Leahy* v. *De Moleyns*, [1896] 1 Ir. R. 206). As to concealed fraud see *Re McCallum*, *McCallum* v. *McCallum*, [1901] 1 Ch. 143.

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woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession (*u*).

(2) "No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded."

PARAGRAPH (1).

Criticism of statute.

The above article, which is a reprint of s. 8 (1), (2), of the Trustee Act, 1888 (51 & 52 Vict. c. 59), has completely revolutionised the law; but it is extremely difficult to understand what paragraph (a) of sub-s. (1) was aimed at. It could not have been aimed at claims for the recovery of land or other property, or the proceeds thereof retained by the trustee personally, because such claims are expressly excluded. Nor could it have been aimed at claims against purchasers from the trustee with notice of a breach of trust, because such claims are already provided for by s. 25 of 7 Will. 4 & 1 Vict. c. 28. Nor, it is conceived, could it have been intended to apply to actions for what may be called negligent breaches of trust, or breaches arising from mistake or the like, because such actions are for equitable wrongs *sui generis* neither arising out of tort or contract, and not falling within the provisions of any pre-existing Statute of Limitations (*x*); indeed, such claims are obviously intended to be provided for by paragraph (b). The conundrum proved too tough for Sir EDWARD FRY (*y*), but the

(*u*) As to when the statute begins to run in cases where the plaintiff has always been in possession, but acquires a new title, see *Mara* v. *Browne*, [1895] 2 Ch. 69, *sed quære*. Although this case was subsequently reversed ([1896] 1 Ch. 199), it was on another point.

(*x*) See *Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 444.

(*y*) *Ib.*

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Court of Appeal grappled with it in the subsequent case of *How* v. *Earl Winterton* (*z*), and expressed an opinion that there might be cases (such as a claim for an account) where the old statutes of limitation applied unless the claim was against a trustee; and RIGBY, L.J., hinted that where the trust was created by deed executed by the trustee, there might possibly be an action on the implied covenant by him to perform the trust, which would only be barred after twenty years.

Failure to convert according to imperative direction.

Trustees, in breach of trust, carried on a testator's business until the youngest child attained twenty-one in the year 1882, when they sold everything, and divided the proceeds between all the children. In 1890, one of these children commenced an action seeking to make the trustees liable for a loss incurred through carrying on the business. It was held, however, that it was not an action for a legacy to which twelve years was a bar under 37 & 38 Vict. c. 57, s. 8, but an action for breach of trust to which no existing statute of limitations applied before 1889; and that, consequently, under the Act of 1888, s. 8 (1)(b), the lapse of six years was a bar (*a*).

The whole fund expended in maintenance.

Where property was held in trust for an infant on attaining twenty-one (which he did in 1880), and in 1892 he sued the trustee for an account, and the trustee deposed that he had (which was not contradicted) expended the entire fund in the maintenance and education of the infant, it was held that the Act of 1888 barred any claim to an account or other relief (*b*).

Payment of capital to life tenant.

In one case a testator's estate was divisible into fourths. He gave one-fourth to each of his three executors absolutely, and directed them to retain the remaining fourth upon trust for his daughter for life with remainder in trust for her children. The executors paid the daughter's share to her instead of retaining it. More than six years after her death one of her children sued them for the breach of trust. Held that the trustees were originally liable as trustees and not as executors,

(*z*) [1896] 2 Ch. 626.
(*a*) *Re Swain, Swain* v. *Bringeman*, [1891] 3 Ch. 233.
(*b*) *Re Page. Jones* v. *Morgan*, [1893] 1 Ch. 304.

and that therefore the claim was barred at the end of six years from the death of the life tenant (*e*). Art. 77.

Mortgage of insufficient value.

In August, 1878, trustees committed an innocent breach of trust, by investing on mortgage of property of insufficient value. The mortgagee paid interest direct to the tenant for life until 1890. In 1892, the tenant for life and infant remainderman brought an action to compel the trustees to make good the amount invested, and it was conceded that they had no defence against the remainderman. It was, however, held, that, *quà* the tenant for life, his right to complain was barred at the expiration of six years *from the date of the investment*, that being the date of the breach of trust (*d*).

Applicable to a claim for accounts.

The Act is applicable to a claim for accounts to the extent that the plaintiff cannot pick holes in the account for more than six years before action (*e*).

Defendant retaining the trust property cannot plead the statute.

Where a husband forcibly deprived a wife of a legacy given to her for her separate use, and retained it until his death, it was held that his executors could not plead the statute in answer to an action by the wife. For the husband took the property with notice of the trust affecting it, and was, therefore, in the position of an express trustee (*f*).

Statute has no application where there has been a false statement made.

The statute affords no defence to an action against a firm of solicitors who have falsely told their client that money which he had intrusted to them for investment had been, in fact, invested on mortgage; the truth being that a clerk of the solicitors had embezzled it (*g*).

How far the Act applies where trustee has remotely benefited by breach.

The exceptions in s. 8 of the Act of 1888, do not prevent a trustee having the benefit of the statute, where a trust

(*e*) *Re Timmis*, *Nixon* v. *Smith*, [1902] 1 Ch. 176.

(*d*) *Re Somerset*, *Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231.

(*e*) *How* v. *Earl Winterton*, [1896] 2 Ch. 626. For form of order, as subsequently amended, see *S. C.*, as reported in 79 L. T. 344, and *Re Davies*, *Ellis* v. *Roberts*, [1898] 2 Ch. 142.

(*f*) *Wassell* v. *Leggatt*, [1896] 1 Ch. 554. See *Re Tufnell*, *Byng* v. *Tufnell*, 18 T. L. R. 705. See also *North American, etc. Co.* v. *Watkins*, [1904] 1 Ch. 242, a case of misappropriation by a fiduciary agent entrusted with money for investment.

(*g*) *Moore* v. *Knight*, [1891] 1 Ch. 547; and see also *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196. *Aliter*, if they did not know of the fraud, see next page.

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fund advanced on an insufficient security was, in fact, applied by the borrower in payment of a debt to his bankers, of whom the trustee was one (*h*).

Embezzlement by trustee's agent.

The statute is none the less applicable because the money has been embezzled, and is retained by one who was the trustee's agent; provided the trustee has not fraudulently kept the true facts from the beneficiaries (*i*).

How far statute applicable to illegal trust.

It has been held that trustees of a void charitable conveyance, if in possession for twelve years, gain a title by the ordinary Statute of Limitations; on the ground that the express trust was illegal, and that the resulting trust, although discoverable on the face of the settlement, was inconsistent with it (*k*).

Resulting trust depending on absence of express trust.

But on the other hand, in *Patrick* v. *Simpson* (*l*), where there was a resulting trust depending, not on illegality, but on the absence of an express trust, it was held that the trustee could not retain the property and plead the statute; for the resulting trust was as obvious on the face of the settlement as if it had been expressed, and was not inconsistent with it.

Other constructive trusts.

However, a resulting or other constructive trust *depending upon evidence* outside the written instrument, was always within the Statutes of Limitation (*m*). Therefore, a tenant for life of leaseholds who renews in his own name (*n*), or a mortgagee in possession (even although the mortgage be in the form of a trust (*o*)), is entitled to plead the statute and keep the property.

Trust apparently constructive, but really express.

But, although, as a general rule, constructive trustees can avail themselves of the statute whilst keeping the property for their own benefit, the mere fact that a person is called an *agent*

(*h*) *Re Gurney, Mason* v. *Mercer*, [1893] 1 Ch. 590; and see *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685; *Butler* v. *Butler*, 7 Ch. D. 116; and *Whitney* v. *Smith*, 4 Ch. App. 513.

(*i*) *Thorne* v. *Heard*, [1895] A. C. 495.

(*k*) *Churcher* v. *Martin*, 42 Ch. D. 312; *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149.

(*l*) 21 Q. B. D. 128, following *Salter* v. *Cavanagh*, 1 D. & Wal. 668. But this seems to imply a knowledge of law (or equity) which is not very widespread.

(*m*) *Beckford* v. *Wade*, 17 Ves. 97.

(*n*) *Petre* v. *Petre*, 1 Drew. 371.

(*o*) *Locking* v. *Parker*, 8 Ch. App. 30.

instead of a trustee, does not confer on him the statutory protection accorded to constructive trustees, if he was, in fact, expressly trusted with money or property *for a particular purpose;* for in that case he becomes an express trustee (*p*). Art. 77.

Simple charges are expressly provided for by the old statute (*q*). Where, however, a charge is so coupled with a trust as to be in reality a trust itself, the old statute does not apply. For instance, where a testator charged his property with payment of his debts, and imposed an obligation on the devisee to exert himself *actively* in paying the debts, the case did not fall within the old statute (*r*); and it is conceived that it would not fall within the provisions of the new Act. Charges.

ART. 78.—*Protection against the Acts of Co-Trustee.*

(1) A trustee is not answerable for the receipts, acts, or defaults of his co-trustee (*s*), save only—

(a) where he *hands* the trust property to him without seeing to its proper application;

(b) where he allows him to *receive* the trust property without making due inquiry as to his dealing with it (*t*);

(c) where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution and redress, or to prevent the meditated wrong (*u*).

(*p*) See *Burdick* v. *Garrick*, 5 Ch. App. 233; *Foley* v. *Hill*, 2 H. L. Cas. 28; *Re Bell, Lake* v. *Bell*, 34 Ch. D. 462; *Dooby* v. *Watson*, 39 Ch. D. 178; *North American, etc. Co.* v. *Watkins*, [1904] 1 Ch. 242.

(*q*) 3 & 4 Will. 4, c. 27, s. 40.

(*r*) *Hunt* v. *Bateman*, 10 Ir. Rep. Eq. 360.

(*s*) *Dawson* v. *Clarke*, 18 Ves. 247; and as to settlements made since, see 22 & 33 Vict. c. 35, s. 31.

(*t*) See *Wynne* v. *Tempest*, 13 T. L. R. 360.

(*u*) *Millar's Trustees* v. *Polson*, 34 Sc. L. R. 798.

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(2) Even in the above three cases he may be made irresponsible by express declaration in the settlement (*x*).

Leading case.

Thus, in the case of *Wilkins* v. *Hogg* (*y*), which now governs the subject, a testatrix, after appointing three trustees declared that each of them should be answerable only for losses arising from his own default, and not for involuntary acts or for the acts or defaults of his co-trustees; and particularly, that any trustee who should pay over to his co-trustees, or should do or concur in any act enabling his co-trustees to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered liable by any express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to insurance companies for sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had invested it. This trustee having misapplied it, it was sought to make his co-trustees responsible; but Lord WESTBURY held that they were not, saying: "There are three modes in which a trustee would become liable according to the ordinary rules of law—first, where, being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. The framer of the clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee acting under this will would be responsible. He would still be answerable for collusion if he handed over trust money to his co-trustee with reasonable ground for

(*x*) As to the whole of the article, see judgment of WESTBURY, L.C., in *Wilkins* v. *Hogg*, 3 Giff. 116; 8 Jur. (N.S.) 25; and see also *Dix* v. *Burford*, 19 Beav. 409; *Mucklow* v. *Fuller*, Jac. 198; *Brumridge* v. *Brumridge*, 27 Beav. 5.

(*y*) *Supra*.

believing or suspecting that that trustee would commit a breach of trust; but no such case as this was made by the bill."

In the more recent case of *Pass* v. *Dundas* (*z*), the settlement contained a similar protective clause to that stated in the last illustration. Part of the trust estate consisted of a business, and one of the trustees authorised his co-trustee to draw money out of the bank for the purposes of the business, which money the co-trustee misapplied. It was held that, under the words of the clause, the trustee was protected.

ART. 79.—*Concurrence of or Release by the Beneficiaries.*

A beneficiary who has assented to, or concurred in, a breach of trust (*a*), or who has subsequently released or confirmed it (*b*), or even acquiesced in it, cannot afterwards charge the trustees with it: Provided—

(a) that the beneficiary was *sui juris* at the date of such assent or release (*c*);

(b) that he had full knowledge of the facts and knew what he was doing (*d*), and the legal effect thereof (*e*), *or* has had and retains the benefit of the breach (*f*);

(*z*) 29 W. R. 332.

(*a*) *Brice* v. *Stokes*, 11 Ves. 319; *Wilkinson* v. *Parry*, 4 Russ. 272; *Nail* v. *Punter*, 5 Sim. 555; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Walker* v. *Symonds*, 3 Sw. 1; *Evans* v. *Benyon*, 37 Ch. D. 329.

(*b*) *French* v. *Hobson*, 9 Ves. 103; *Wilkinson* v. *Parry*, *supra*; *Creswell* v. *Dewell*, 4 Giff. 460.

(*c*) *Underwood* v. *Stevens*, 1 Mer. 712; *Lench* v. *Lench*, 10 Ves. 511; *Lord Montford* v. *Cadogan*, 19 Ves. 9.

(*d*) *Re Garnett*, *Gandy* v. *Macauley*, 31 Ch. D. 1; *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 135; *Hughes* v. *Wells*, 9 Hare, 749; *Cockerell* v. *Cholmeley*, 1 R. & M. 418; *Strange* v. *Fooks*, 4 Giff. 408; *March* v. *Russell*, 3 My. & Cr. 31; *Aveline* v. *Melhuish*, 2 D. J. & S. 288.

(*e*) *Re Garnett*, *Gandy* v. *Macauley*, *supra*; *Cockerell* v. *Cholmeley*, *supra*; *Marker* v. *Marker*, 9 Hare, 1; *Burrows* v. *Walls*, 5 D. M. & G. 233; *Stafford* v. *Stafford*, 1 D. & J. 193; *Strange* v. *Fooks*, *supra*.

(*f*) *Crichton* v. *Crichton*, [1895] 2 Ch. 853.

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(c) that no undue influence was brought to bear upon him to extort the assent or release (*g*).

Distinction between right to plead concurrence and the right to indemnity.

The reader must carefully distinguish between the rules stated in the present article, and those stated in Art. 80, *infra*. The present article relates exclusively to the circumstances under which a trustee may plead concurrence or assent, by way of defence to an action by the concurring or assenting beneficiary. Article 80, on the other hand, deals with the question as to the circumstances under which a trustee, who may possibly have no defence to an action for breach of trust, may yet call upon his co-trustee or a concurring or assenting beneficiary to indemnify him against the consequences of the breach.

Plaintiff party to breach of trust.

Stock was settled on a married woman for her separate use for life, with a power of appointment by will. The trustees, at the instance of the husband, sold out the stock and paid the proceeds to him. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and were allowed time to re-transfer the remainder. The wife then died, having by her will appointed the stock to the husband. He then filed a bill against the trustees, claiming the stock under the appointment, and praying for the same relief as his wife might have had. It is needless to say that his claim was promptly rejected (*h*).

Release.

A formal release under seal, or an express confirmation, will, of course, estop a beneficiary from instituting subsequent proceedings; and it would seem that any positive act or expression indicative of a clear intention to waive a breach of trust, will, *if supported by valuable consideration* (*however slight*), be equivalent to a release (*i*).

(*g*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 226; *Chesterfield* v. *Janssen*, 2 Ves. sen. 125.

(*h*) *Nail* v. *Punter*, 5 Sim. 555.

(*i*) See *Stackhouse* v. *Barnston*, 10 Ves. 456; *per* Sir W. GRANT; and *Farrant* v. *Blanchford*, 11 W. R. 178.

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Acquiescence.

Even before the Trustee Act, 1888 (51 & 52 Vict. c. 59), a beneficiary under a declared trust might disentitle himself to relief by acquiescence. Thus, where a trustee, with the knowledge, but without the consent of the beneficiary, accepted a reduced rent from a lessee of the trust property, and the beneficiary complained of the abatement, but took no steps to put an end to it for some years, it was held that after the expiration of the trust, the trustee could not be called upon to make up the deficiency (*k*). And generally speaking, the same result follows, where, with full knowledge of a breach of trust, the beneficiaries take no steps for many years (*l*).

Laches not always a bar.

But, although long acquiescence is a bar to relief, the reason for so holding is, that the fact of lying by for a considerable period, is evidence of an *intention* or election on the part of the beneficiary not to exercise his strict rights. Consequently, where the circumstances are such as to afford no ground for any such presumption, acquiescence, however long, will be no bar to relief (1) unless the Statute of Limitations is applicable (*m*): or (2) unless under the circumstances it appears to be for the general convenience that a suit in respect of a long dormant grievance should be disallowed. In the latter case the court will refuse relief on the ground that "*Expedit reipublicæ ut sit finis litium.*" For instance, where a plaintiff seeks to set aside a purchase obtained from him by his solicitor, a delay of less than twenty years *may* bar the right to relief, if it would be inconvenient to grant it (*n*). So where, in an action for an account, the plaintiff by lying by has rendered it impossible or very inconvenient for the defendant to render the account, he will get no relief (*o*).

SUB-PARAGRAPH (a).

Infants incapable of release or acquiescence.

An infant cannot lose his right to relief, either by concurrence or release; for the law presumes that he has not the requisite discretion to judge.

(*k*) *McDonnell* v. *White*, 11 H. L. C. 570.

(*l*) *Sleeman* v. *Wilson*, 13 Eq. 36; and see also *Jones* v. *Higgins*, 2 Eq. 538.

(*m*) See and consider *Re Cross*, *Harston* v. *Tenison*, 20 Ch. D. 109; and see also *Farrant* v. *Blanchford*, 11 W. R. 178.

(*n*) *Gresley* v. *Mousley*, 4 D. & J. 78.

(*o*) See *per* Lord ALVANLEY, in *Pickering* v. *Stamford*, 2 Ves. 272;

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Married women, how far capable of releasing or acquiescing.

Even where a married woman is entitled to the fund for her separate use (either expressly or under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)), without restraint on anticipation, the court looks with grave suspicion upon a defence that she has concurred in or assented to a breach of trust, as will be seen *infra*, p. 409. And where it is not her separate property, of course she can in any event only concur by deed executed with her husband's consent and with all the formalities required by the statutes 3 & 4 Will. 4, c. 74, or 20 & 21 Vict. c. 57, as the case may be. But if *she is restrained from alienating or anticipating it* (*p*), she is not competent to consent to, or to release, a breach of trust at all; and her concurrence or release would, at all events before the passing of the Trustee Act, 1888 (51 & 52 Vict. c. 59), afford no protection to the trustee even if the breach had been procured by her fraud (*q*). However (as will be seen from Article 80, *infra*), by s. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (which re-enacts s. 6 of the Act of 1888), the court may, *if it thinks fit*, impound the interest of a married woman restrained from alienation, who has instigated, or requested, or consented in writing to a breach of trust, for the purpose of indemnifying the trustee.

Danger of yielding to the requests of *femme covert*.

The danger incurred by trustees who listen to the supplications of married women who are restrained from anticipation, was very vigorously pointed out by Lord LANGDALE in *Fyler* v. *Fyler* (*r*), in a passage which ought to be learnt by heart by every trustee. "We find," said his lordship, "a married woman throwing herself at the feet of the trustee, begging and entreating him to advance a sum of money out of the trust fund, to save her husband and her family from utter ruin, and making out a most plausible case for that purpose. His compassionate feelings are worked upon, he raises and advances the money; the object for which it was given entirely fails, the

and see also *Clegg* v. *Edmonston*, 3 Jur. (N.S.) 299; *Tatam* v. *Williams*, 3 Hare, 347.

(*p*) *Stanley* v. *Stanley*, 7 Ch. D. 589.

(*q*) *Stanley* v. *Stanley*, *supra*; *Sharpe* v. *Foy*, 4 Ch. App. 35, and see *Re Lush*, *ib.* 591; and see *Birmingham, etc. Society* v. *Lane*, [1904] 1 K. B. 35, and *Brown* v. *Dimbleby*, *ib.* 28.

(*r*) 3 Beav. 550.

husband becomes bankrupt, and in a few months the very same woman who induced the trustee to do this, files a bill in the Court of Chancery to compel him to make good that loss to the trust. These are cases which, when they happen, shock everybody's feelings at the time; *but it is necessary that relief should be given in such cases; for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust could ever be preserved.*" Art. 79.

SUB-PARAGRAPH (b).

Full knowledge of beneficiary essential.

Even a release under seal (and *à fortiori* mere concurrence or subsequent acquiescence) will not avail the trustee unless the beneficiary had full knowledge. Thus a release to a trustee has been set aside after the lapse of more than twenty years, and after the death of the trustee, on evidence of the plaintiff (corroborated by the tenor of the release) that it was executed in error, although no fraud was imputed (*s*).

So where, on the footing of a supposed illegitimacy, the title of a beneficiary to a trust legacy was disputed and denied by the trustee, and the former was thereby induced to accept from the trustee a smaller sum than that to which he was entitled under the will, and, by deed, to release the trustee from the payment of the legacy, the court would not permit the release to stand even after the lapse of more than twenty-five years (*t*).

Ignorance of beneficiary where he has had the advantage of the breach.

But it seems that where a beneficiary has had the advantage of a breach of trust, then notwithstanding his want of knowledge of the breach, he cannot sue the trustee without replacing the amount which he himself has received by reason of the breach. Thus, where part of the proceeds of trust funds misappropriated by a father were made subject to the marriage settlement of his son, a beneficiary in remainder, who was ignorant of the source whence the property proceeded, it was held that the son's representatives were only entitled to have

(*s*) *Re Garnett, Gandy* v. *Macauley*, 31 Ch. D. 1, and see also *Sawyer* v. *Sawyer*, 28 *ib.* 595.

(*t*) *Thompson* v. *Eastwood*, 2 App. Cas. 215; and see *McDonnell* v. *White*, 11 H. L. Cas. 570; and *Dougan* v. *Macpherson*, [1902] A. C. 197.

Art. 79. his share of the trust funds replaced after deducting the value of the proceeds settled (*u*).

ART. 80.—*Trustees generally entitled to Contribution inter se, but may be entitled to be Indemnified by Co-Trustee or Beneficiary who instigated breach.*

(1) As a general rule, where several trustees have been guilty of a breach of trust not amounting to actual fraud (*x*), those who are obliged to pay, will be entitled to exact contribution from the others (*y*); notwithstanding that the former may be more blameworthy, or that the loss caused by the breach only occurred after the death or retirement of the trustee from whom contribution is sought (*z*). Provided nevertheless that:

(a) where one of the trustees is or becomes also a beneficiary, he will in general be liable to indemnify his co-trustee to the extent of his beneficial interest in the trust estate (*a*); and

(b) where one of several trustees has been guilty of fraud, or has been the confidential solicitor of his co-trustees, he may have to indemnify them and to bear the *whole loss* himself (*b*).

(*u*) *Crichton* v. *Crichton*, [1895] 2 Ch. 853.

(*x*) *Att.-Gen.* v. *Wilson*, Cr. & Ph. 28; see *Lingard* v. *Bromley*, 1 V. & B. 114; *Tarleton* v. *Hornby*, Y. & C. (Ex.) 336.

(*y*) *Lingard* v. *Bromley, supra*; *Birks* v. *Micklethwait*, 33 Beav. 409; *Att.-Gen.* v. *Daugars*, *ib.* 624. This claim to contribution is now considered a specialty debt (19 & 20 Vict. c. 97).

(*z*) *Jackson* v. *Dickinson*, [1903] 1 Ch. 947.

(*a*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*b*) *Bahin* v. *Hughes*, 31 Ch. D. 390; *Blyth* v. *Fladgate*, [1891] 1 Ch., at p. 365; *Featherstone* v. *West*, 6 Ir. Rep. Eq. 86; *Lockhart* v. *Reilly*, 25 L. J. Ch. 697; *Thompson* v. *Finch*, 22 Beav. 316; 8 D. M. & G. 560; and see *Butler* v. *Butler*, 7 Ch. D. 116; *Wynne* v. *Tempest*, [1897] 1 Ch. 110.

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(2) "Where a trustee commits a breach of trust at the instigation or request (*c*) or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, (and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation), make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him" (*d*).

(3) Such contribution or indemnity may be ordered in the action in which the liability for breach of trust is established without any counter-claim (*e*).

Paragraph (1).

Contribution between trustees.

A., one of the trustees of a settlement, allowed his co-trustee B. to have the trust fund to invest. B. handed it to an "outside broker," who misappropriated parts of it:—*Held*, that both trustees were *in pari delicto*, and that B. was, therefore, entitled to contribution from A., although he had taken a more active part in the transaction which led to the loss; and that as between the trustees, time did not begin to run under the Statute of Limitations until the judgment declaring them liable for breach of trust (*f*).

Lien of trustee for contribution,

So where a large balance was found to be due jointly from a trustee and the representatives of a deceased co-trustee (*g*), but

(*c*) The *request* need not be in writing, although a mere *consent* must be: *per* Kekewich, J., in *Griffith* v. *Hughes*, [1892] 3 Ch. 105; and *per* Lindley, L.J., in *Re Somerset*, *Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45.

(*e*) *Priestman* v. *Tindall*, 24 Beav. 344; *Re Holt*, *Holt* v. *Holt*, [1897] 2 Ch. 525.

(*f*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415. As to contribution by directors of a company where one of them has been made responsible for a breach of trust in misapplying the company's assets, see *Ramskill* v. *Edwards*, 31 Ch. D. 100.

(*g*) It need scarcely be pointed out that the representatives of a deceased trustee are not liable for a breach of trust committed after his death, where he has left the trust fund in a proper state of investment (*Re Palk*, *Chamberlain* v. *Drake*, 41 W. R. 28). Of course, they may be liable where he has not so left it (*Gibbins* v. *Taylor*, 22 Beav. 344).

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on costs awarded to co-trustee.

costs were given to both out of the trust estate, it was held (the estate of the deceased co-trustee being insolvent, and therefore unable to contribute) that the surviving trustee, upon paying the whole of the loss, was entitled to a lien for half of it on the costs awarded to the representatives of his deceased co-trustee (*h*).

PARAGRAPH (1) (a).

Trustee-beneficiary generally bound to indemnify co-trustee to extent of his beneficial interest.

This sub-paragraph is well illustrated by the case of *Chillingworth* v. *Chambers* (*i*). There the plaintiff and defendant, the trustees of a will, had committed breaches of trust by investing on insufficient securities, bearing a high rate of interest, and were declared to be jointly and severally liable to make good the loss to the trust estate. The plaintiff trustee, after some and before others of the investments in question had been made, became also beneficially entitled to a share in the trust estate, as the successor in title of his deceased wife. He claimed to be entitled to contribution from the defendant trustee on the ground that they were both *in pari delicto*. The court, however, rejected his claim on the ground that the rule as to the right of a trustee to contribution from his co-trustee for loss occasioned to the estate by a breach of trust for which both are equally to blame, does not apply where one of them is also a beneficiary, and has received as between himself and his co-trustee an exclusive benefit by the breach. In that case, the rule to be applied is that under which the share or interest of a beneficiary who has assented to, and profited by, a breach of trust has to bear the whole loss; and the trustee who is a beneficiary must therefore indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received. LINDLEY, M.R., in giving judgment, after quoting previous authorities, said: "These cases are all based on obvious good sense: for if I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw the blame on him. Whatever our liabilities may be to other

(*h*) *Fletcher* v. *Green*, 33 Beav. 426; and see also *Collings* v. *Wade*, [1903] 1 Ir. R. 89, where the insolvent trustee subsequently died a rich man.

(*i*) [1896] 1 Ch. 685. See also *Moxham* v. *Grant*, [1900] 1 Q. B. 88, where directors of a company were held entitled to indemnity from shareholders who had been paid capital *ultra vires*.

people, still, as between him and me, the loss clearly ought to fall on me. Whether I am solely entitled to the property, or have only a share or a limited interest, still the loss which I sustain in respect of my share or interest must clearly be borne by me, not by him." Art. 80.

Paragraph (1) (b).

In *Bahin* v. *Hughes* (*k*), Cotton, L.J., said: "On going into the authorities there are very few cases in which one trustee who has been guilty with a co-trustee of breach of trust, and held responsible, has successfully sought indemnity as against his co-trustee. *Lockhart* v. *Reilly* (*l*) and *Thompson* v. *Finch* (*m*) are the only cases which appear to be reported. Now, in *Lockhart* v. *Reilly*, it appears from the report of the case in the Law Journal, that the trustee by whom the loss was sustained had been not only trustee, but had been and was a solicitor, and acting as solicitor for himself and his co-trustee; and it was on his advice that Lockhart had relied in making the investment which gave rise to the action of the *cestuis que trust* (*n*). . . . Of course where one trustee has got the money into his own hands, and made use of it, he will be liable to his co-trustee to give him an indemnity (*o*). Now I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust*; but so far as cases have gone at present, relief has only been granted against a trustee *who has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation, which will justify the court in treating him as solely liable for the breach of trust.*" Cases in which one trustee is bound to indemnify his less guilty co-trustees.

It must not, however, be assumed from this judgment that a solicitor-trustee who advises the commission of a breach of trust is necessarily bound to indemnify his co-trustees; for Solicitor-trustee not necessarily liable to indemnify co-trustee.

(*k*) 31 Ch. D. 390, 394; and see also *Robinson* v. *Harkin*, [1896] 2 Ch. 415.
(*l*) 25 L. J. Ch. 697.
(*m*) 22 Beav. 316; 8 D. M. & G. 560.
(*n*) See also to same effect *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; and *Re Linsley, Cattley* v. *West*, [1904] W. N. 140.
(*o*) See *Featherstone* v. *West*, 6 Ir. Rep. Eq. 86.

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where the co-trustee has himself been an active participator in the breach of trust and has not participated in it merely in consequence of the advice and control of the solicitor, he will have no right to be indemnified. Thus, where one of the trustees (a lady) joined in the importunities of her brother, and thus induced her co-trustee (a solicitor) to commit a breach of trust for the brother's benefit, it was held that she was not entitled to call upon the solicitor-trustee for an indemnity (*p*).

Even where trustee incidentally benefits by breach, not always liable to indemnify co-trustee.

Although, as stated by Lord Justice COTTON in *Bahin* v. *Hughes* (*q*), a trustee who has got the trust money into his own hands and made use of it, will in general be liable to indemnify his co-trustee, yet he will not have to do so where his breach of trust is only remotely connected with the loss; unless, of course, he was guilty of actual fraud. Thus the fact of a borrower of trust funds on insufficient security, repaying out of the money so borrowed a debt due from him to one of the trustees, is not, of itself, sufficient to render the trustee accepting repayment liable, the borrower being under no restriction as to its application (*r*).

PARAGRAPH (2).

Breaches of trust committed at the instigation, or request, or with consent of beneficiaries.

Section 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (which is set out verbatim in paragraph (2) of the present Article), was apparently intended to give legislative sanction to the former rule of the court with the following slight modifications, viz., to confer on the court power (1) to impound the interest of a married woman although restrained from anticipation, and (2) to extend the relief to cases where the beneficiary has merely passively "consented in writing," to the breach as distinguished from cases where he actively requested or instigated it (*s*).

(*p*) *Head* v. *Gould*, [1898] 2 Ch. 250.
(*q*) *Supra*, Illust. 1.
(*r*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685; *Butler* v. *Butler*, 7 Ch. D. 116; and see also *Whitney* v. *Smith*, 4 Ch. App. 513.
(*s*) With regard to the procedure where the plaintiff is an innocent beneficiary and the trustee desires to claim indemnity against another beneficiary, see *Re Holt, Holt* v. *Holt*, [1897] 2 Ch. 525.

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To render beneficiary liable to indemnify trustee, he must have known that act was a breach of trust.

In order to make a beneficiary liable under s. 45 of the Act of 1893, he must not only have instigated or requested or consented in writing to the breach, but must also have known the facts which would render what was done a breach of trust. Thus, where a tenant for life undeniably requested trustees to invest the trust fund on a certain security, but it did not appear that he intended to be a party to a breach of trust, and in effect he left it to the trustees to determine whether the security was a proper one for the sum to be advanced, it was held that the trustees could not impound his life interest to make good the breach (*t*). But if the tenant for life had been proved to have *knowingly requested a breach of trust*, the decision would (even before the statute) have been otherwise (*u*).

No right to impound in order to make good the trustee's beneficial interest.

The right of a trustee to impound the interest of beneficiaries who have instigated a breach is, however, only applicable for the purpose of indemnifying him against the claims of other beneficiaries. It does not extend to indemnify him against other losses. Thus, where a trustee subsequently became entitled to share in the trust fund as one of the next of kin of a beneficiary, it was held that he could not call on a beneficiary at whose instigation the breach was committed to indemnify him against loss as such next of kin, even although the beneficiary had given him an express covenant of indemnity (*v*). It is submitted that the same principle would apply *à fortiori* to the statutory right, which is not so strong in favour of the trustee as an express covenant.

Guilty knowledge must be conclusively proved in the case of a married woman.

In the case of a married woman, the court will require stricter proof of her guilty knowledge than in the case of a man. Even where she was not restrained from anticipation and the charge by way of indemnity was express, and not merely statutory, it was held that her position was very different to that of a male beneficiary, Fry, L.J., saying (*y*): "Before a

(*t*) *Re Somerset, Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231; *Mara* v. *Browne*, [1895] 2 Ch. 69.
(*u*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 108; *Bolton* v. *Curre*, [1895] 1 Ch. 544.
(*v*) *Evans* v. *Benyon*, 37 Ch. D. 329.
(*y*) *Sawyer* v. *Sawyer*, 28 Ch. D. 595.

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trustee can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, it appears to us to be reasonable that he should show that the charge or right of retainer, was created by her with a full knowledge of all the circumstances. It is probable that, in the case of a man of full years, the court would presume him so to be acting; but in the case of a *feme covert*, we do not think the presumption exists in favour of the trustee, whose primary duty it was to protect the fund for her benefit. . . . All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, as far as we are aware, cases in which she has been an actual actor in the transaction herself: such are the cases of *Crosby* v. *Church* (*z*), *Clive* v. *Carew* (*a*), and *Pemberton* v. *Gill* (*b*). In no case so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust."

Where married woman restrained from alienation.

Indeed, where the married woman is restrained from alienation it would seem that the statutory power of the court to impound her interest (which is merely discretionary), will only be exercised in the plainest cases, as, for instance, where she has been guilty of fraud; and never, apparently, where the trustee knew that he was committing a breach of trust and yielded weakly to her solicitations (*c*).

Where trustees have wrongfully parted with trust fund to trustees of subsidiary settlement.

In any case where trustees, at the request of a beneficiary, advance the trust fund to her, with notice that she has settled it by another settlement, they cannot impound her income under such other settlement, because that income is not the interest of a beneficiary in the trust estate *of which they are the trustees* (*d*).

(*z*) 3 Beav. 485.
(*a*) 1 J. & H. 199.
(*b*) 1 Dr. & Sm. 266.
(*c*) *Ricketts* v. *Ricketts*, 64 L. T. 263; *Bolton* v. *Curre*, [1895] 1 Ch. 544; *Re Holt*, *Holt* v. *Holt*, [1897] 2 Ch. 525. But *cf. Griffith* v. *Hughes*, [1892] 3 Ch. 105, where KEKEWICH, J., exercised the power, and *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648, where KENNEDY, J., seemed to hint that he might have exercised the power if the lady had been party to the action.
(*d*) *Ricketts* v. *Ricketts*, *supra*.

CHAPTER III.

LIABILITY OF THIRD PARTIES AND BENEFICIARIES.

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ART. 81.—*Liability of Third Parties or Beneficiaries who are Parties to a Breach of Trust.*

(1) All persons who knowingly (*a*) meddle with trust funds, or mix themselves up with a breach of trust, are equally liable with the trustees; and equally subject to the restrictions on the right of pleading the statutes of limitation (*b*).

(2) Where a person who is indebted to the trust estate (*c*) (whether by reason of being mixed up in a breach of trust or in respect of a simple debt), has an equitable interest in the trust property (whether original or derivative (*d*)), it may be impounded to make good his liability to the trust estate. This right is available not only against him personally (*e*), but also against all persons

(*a*) See *Re Kingston, etc. Co.* (No. 2), [1896] 1 Ch. 331; *Williams* v. *Williams*, 17 Ch. D. 437.

(*b*) *Re Barney, Barney* v. *Barney*, [1892] 2 Ch. 265; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Dixon* v. *Dixon*, 9 Ch. D. 587; *Morgan* v. *Elford*, 4 Ch. D. 352; *Lee* v. *Sankey*, 15 Eq. 204; *Rolfe* v. *Gregory*, 11 Jur. (N.S.) 98.

(*c*) *Re Taylor, Taylor* v. *Wade*, [1894] 1 Ch. 671.

(*d*) *Jacubs* v. *Rylance*, 17 Eq. 341; *Doering* v. *Doering*, 42 Ch. D. 203; *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*e*) *Woodyatt* v. *Gresley*, 8 Sim. 180; *Fuller* v. *Knight*, 6 Beav. 205; *M'Gachen* v. *Dew*, 15 Beav. 84; *Vaughton* v. *Noble*, 30 Beav. 34; *Jacubs*

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claiming under him, including purchasers for value without notice (*f*). But where he takes a *legal* (as distinguished from an equitable) beneficial interest under the same settlement, that cannot be touched (*g*).

(3) Paragraph (2) is (*semble*) now applicable (in the discretion of the court) where the party is a married woman restrained from anticipation, if she has instigated or requested a breach of trust, or consented to it in writing (*h*); but not otherwise (*i*).

PARAGRAPH (1).

Trust fund lent to tenant for life.

A trustee, in breach of trust, lends the trust fund to the tenant for life. Here both the trustee and the tenant for life, who has got the trust funds into his own hands by a breach of trust to which he was himself a party (*k*), will be jointly and severally liable to the beneficiaries.

Third party with notice of breach is liable.

A testator bequeathed a sum of £600 (which he described as being in the hands of one Gregory, to whom he had lent the same on the security of his note of hand), to his son-in-law Rolfe, upon certain trusts. Rolfe, the trustee, became indebted to Gregory, and in order to discharge part of that debt he delivered to Gregory the note of hand for £600. It was held that as Gregory had information of the manner of the bequest he was a party to the fraudulent abstraction of the trust property, and liable to refund the amount; and that being founded on fraud, the Statute of Limitations did not apply (*l*).

v. *Rylance*, 17 Eq. 341; *Re Taylor*, *Taylor* v. *Wade*, *supra*; *Re Weston*, *Davies* v. *Tagart*, [1900] 2 Ch. 164.

(*f*) *Jacubs* v. *Rylance*, *supra*; *Doering* v. *Doering*, *supra*; *Bolton* v. *Curre*, [1895] 1 Ch. 544; *Edgar* v. *Plomley*, [1900] A. C. 431.

(*g*) *Egbert* v. *Butter*, 21 Beav. 560; *Fox* v. *Buckley*, 3 Ch. D. 508; but see *Woodyatt* v. *Gresley*, *supra*.

(*h*) *Semble*, under s. 45 of the Trustee Act, 1893 (56 & 57 Vict c. 53), the beneficiaries being subrogated to the trustees.

(*i*) *Stanley* v. *Stanley*, 7 Ch. D. 589, and *Hale* v. *Sheldrake*, 60 L. T. 291.

(*k*) *Cowper* v. *Stoneham*, 68 L. T. 18.

(*l*) *Rolfe* v. *Gregory*, *supra*; *Dixon* v. *Dixon*, 9 Ch. D. 587.

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Bankers with notice of trust fund.

Again, a fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund; and, by the *direction of the tenant for life only*, they transferred it to his account, and thereby obtained payment of a debt due from him to them. Held that the trustees might sue the bankers to have the trust fund replaced, and that the Statute of Limitations was not applicable (*m*).

Trust fund paid to wrong person on faith of forged certificate.

In *Eaves* v. *Hickson* (*n*) trustees had paid over trust funds bequeathed to the children of one William Knibb, upon the faith of a forged marriage certificate, which *William Knibb produced to them*, from which it appeared that certain illegitimate children of his were legitimate. It was held that William Knibb, who had produced the certificate, must be made responsible for the money as well as the trustees.

Trustee *de son tort.*

In general, beneficiaries may proceed against an agent of their trustee where he has not confined himself to the duties of an agent (*o*), but, by accepting a delegation of the trust (*p*), or by fraudulently mixing himself up with a breach of trust, has become a trustee by construction of equity (*q*). It is, however, essential to the character of a *trustee de son tort*, that he should have trust property either actually vested in him, or so far under his control, that he is in a position to require that it should be vested in him (*r*). For instance, solicitors who prepare deeds relating to contemplated technical breaches of trust but advise against their execution, are not liable if they have no reason to suspect dishonesty (*s*). But where the capital of a trust fund having got into the hands of the trustee's solicitor, was, through his intervention, spent by the trustee, the solicitor was held liable (*t*); for where trust

(*m*) *Bridgman* v. *Gill*, 24 Beav. 302. As to rights of bankers where trust funds are paid in to the trustee's private account, see *infra*, p. 421.
(*n*) 30 Beav. 136.
(*o*) See *Brinsden* v. *Williams*, [1894] 3 Ch. 185.
(*p*) *Cowper* v. *Stoneham*, 68 L. T. 18.
(*q*) *Re Barney*, *Barney* v. *Barney*, [1892] 2 Ch. 265.
(*r*) *Ib.*, and see *Re Blundell*, *Blundell* v. *Blundell*, 40 Ch. D. 370.
(*s*) *Barnes* v. *Addy*, 9 Ch. App. 244.
(*t*) *Morgan* v. *Stephens*, 3 Giff. 226.

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funds come into the custody and under the control of a solicitor, or indeed of anyone else, with notice of the trusts, he can only discharge himself of liability by showing that the property was duly applied in accordance with the trusts (*u*). It is not sufficient, for example, to show that the solicitor invested it by the direction of the trustees in an *unauthorised* (as distinguished from an insufficient (*x*)) investment (*u*); nor that he paid it to *one of several* trustees who misappropriated it (*y*); nor that by the direction of the trustee he paid it to a person to whom he knew it was not payable (*z*): for all of these acts are clear infringements of the trust, as a solicitor ought to be well aware. Of course, however, a solicitor would be justified in paying, and indeed would be compellable to pay, it to the whole of the trustees jointly.

Solicitor knowingly assisting in getting fund in court paid to wrong person.

If a solicitor, knowing that money which is in court belongs to one person, commences proceedings in the name of another, and obtains payment to such other, he is personally chargeable with the amount. Nay, even if he has not actual knowledge of the falseness of the claim, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the truth, he will be made personally responsible for the loss which his want of consideration may cause (*a*).

Solicitor receiving and retaining trust money.

Again, where a solicitor receives trust moneys on payment off of a mortgage, and retains them, he is in the position of an express trustee; and as has been stated above, he can never plead the statutes of limitation in respect of money which he has received and converted to his own use (*b*).

(*u*) *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

(*x*) *Brinsden* v. *Williams*, [1894] 3 Ch. 185, and *Mara* v. *Brown*, [1896] 1 Ch. 199, and see and consider *Stokes* v. *Prance*, [1898] 1 Ch. 212, a case of contributory mortgage, in which it was held that the solicitors who contributed to the mortgage were not postponed to the trustees.

(*y*) *Lee* v. *Sankey*, 15 Eq. 204.

(*z*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282, where the debt which was paid had been declared by the court to be barred by the Statute of Limitations, notwithstanding which the trustee by the hand of the solicitor paid it.

(*a*) *Ezart* v. *Lister*, 5 Beav. 585; *Todd* v. *Studholme*, 3 K. & J. 324; and *Re Dangar*, 41 Ch. D. 178, where the cases are collected.

(*b*) *Moore* v. *Knight*, [1891] 1 Ch. 547; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561; but *cf.*

PARAGRAPH (2).

Where party who has joined in breach is a partial beneficiary made good.

As stated in the second paragraph of the present article, the equitable interest of a partial beneficiary who has made himself liable by joining in a breach of trust, may be stopped at the instance of his co-beneficiaries, until the whole loss to the estate has been made good. This right *of the beneficiaries* must not, however, be confused with the limited right *of the trustee* (treated of in Article 80, *supra*) to impound the interest of a beneficiary who has requested, instigated, or consented in writing to a breach of trust, by way of *indemnifying the trustee himself*. The two rights are essentially different, and it is apprehended that beneficiaries might have the right referred to in paragraph 2 of the present article, in cases where the trustee (who is after all *particeps criminis*) might be refused the right of impounding the interest of the instigating beneficiary. It must also be understood that the rule laid down in paragraph 2 of the present article, applies *à fortiori* to the case of a beneficiary who is also a trustee ; for the liability of the beneficiary is really founded upon his having made himself a *trustee de son tort*. In both cases the trustee, or *trustee de son tort*, is personally liable ; and in both cases in his capacity of beneficiary he must make good his indebtedness to the trust estate before he can claim to share in it (*c*).

Retainer of life income to make good breach instigated by tenant for life.

A trustee, in breach of trust, lent the trust fund to A. B., the tenant for life. The trustee afterwards concurred in a creditor's deed, by which A. B.'s life interest was to be applied in payment of his debts, and the trustee received thereunder a debt due to him from A. B. Before the other creditors had been paid, the trustee retained the life income to make good the breach of trust. It was held that the court would not restrain the trustee from making good the breach of trust out of the life income ; for although the trustee, being a creditor and party to the deed, had, *qua* himself, no right to retain the

Doyle v. *Foley*, [1903] 2 Ir. R. 95, a case of executor *de son tort* ; and *McArdle* v. *Gaughran*, [1903] 1 Ir. R. 106.

(*c*) See *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212, and cases there cited.

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life interest, yet, as representing the beneficiaries, he was justified in doing so (*d*).

Rule applies to derivative as well as to original shares.

The rule applies not only to shares taken directly under the settlement creating the trust, but also to shares purchased from or otherwise derived through or under immediate beneficiaries. Thus, where a Mrs. D., who was trustee and life tenant under a will, took assignments from two of the beneficiaries entitled in remainder, and committed divers breaches of trust which only came to light on her death, it was held that the two shares which she had purchased were liable to make good the loss to the estate. Moreover, this right of the beneficiaries was held to take priority over persons to whom Mrs. D. had mortgaged the shares in question (*e*). The fact that the mortgagees were *bonâ fide* mortgagees for value without notice was immaterial; for the equitable interest in question was a *chose in action*, and purchasers of *choses in action* take subject to all equities. Indeed, so far has this been carried, that such purchasers have been held to take subject to breaches of trust committed *subsequent* to the purchase (*f*).

Retainer of beneficiary's interest to make good a debt due from him to the trust estate, even where statute barred.

The rule now under consideration is not confined to cases of breach of trust, but is equally applicable where a beneficiary is indebted to the trust estate. By a separation deed, after reciting that the husband and wife had agreed to live apart, the husband assigned certain leaseholds to trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds (in the events which happened) in trust for himself; and he covenanted to make up the wife's income to £300 a year. The husband paid nothing under the covenant, and in 1868 he was adjudicated a bankrupt. The trustees proved for arrears due down to the date of the bankruptcy, but there were further arrears due to them since that date. On the death of

(*d*) *Fuller* v. *Knight*, 6 Beav. 205; and see also *Carson* v. *Sloane*, 13 L. R. Ir. 139; *Bolton* v. *Curre*, [1895] 1 Ch. 544.

(*e*) *Doering* v. *Doering*, 42 Ch. D. 203, and cases there cited; and see also *In re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212.

(*f*) *Per* HALL, V.-C., *Hooper* v. *Smart*, 1 Ch. D. 90, 98; and see also *Morris* v. *Livie*, 1 Y. & C. C. C. 380; *Irby* v. *Irby*, 25 Beav. 632; *Barnett* v. *Shefield*, 1 D. M. & G. 371; and *Cole* v. *Muddle*, 10 Hare, 186.

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the wife, the husband's assignee in bankruptcy claimed the leaseholds. It was held, however, that the trustees were entitled to retain them until the arrears were satisfied; and *semble*, that the right of trustees to retain trust property as against a beneficiary who owes money to them as trustees under the instrument creating the trust, exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the court (*g*). The rule applies even where the debt is statute barred (*h*).

How far beneficiary who has been innocently overpaid is liable to refund.

Where a trustee has made an over-payment to a beneficiary in error, he can recoup himself out of any other interest (if any) of that beneficiary in the trust estate (*i*); but the court will not, as a rule, order the over-paid beneficiary personally to refund to the trustee who has been disallowed the item in his accounts (*k*). However, it would seem that a *co-beneficiary* could compel repayment of the excess (*l*); but the *onus* would lie upon him of proving that what the other beneficiary had received was an over-payment, having regard to the value of the estate at the date of the payment, and did not arise merely by reason of *subsequent* depreciation (*m*). This, of course, presupposes that payment at all, at the date in question, was proper; for otherwise, if the date for payment had not arisen, the payment would itself have been a breach of trust to which the payee would have been privy.

Rule does not apply to legal beneficial interests.

But where a testator devised certain real estate for life to one of his executors and trustees, and the devisee afterwards committed a breach of trust, and filed his petition for liquidation, it was held that, as against the trustee in liquidation, the

(*g*) *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164; *Re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212; and see and consider analogous right of executors, *Re Taylor, Taylor* v. *Wade*, [1894] 1 Ch. 671.

(*h*) *Re Akerman, Akerman* v. *Akerman, supra.*

(*i*) *Livesey* v. *Livesey*, 3 Russ. 287; *Dibbs* v. *Goren*, 11 Beav. 483.

(*k*) *Downes* v. *Bullock*, 25 Beav. 54; *Bate* v. *Hooper*, 5 D. M. & G. 338; and consider *Allcard* v. *Walker*, [1896] 2 Ch., at p. 384, as to the converse case, where funds have been erroneously paid to the trustees.

(*l*) *Harris* v. *Harris* (No. 2), 29 Beav. 110.

(*m*) *Re Winslow, Frere* v. *Winslow*, 45 Ch. D. 249; *Fenwick* v. *Clarke*, 4 D. F. & J. 240; *Peterson* v. *Peterson*, 3 Eq. 111; and *Hilliard* v. *Fulford*, 4 Ch. D. 389.

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other beneficiaries had no lien on the interest of the trustee; the Lord Justice JAMES saying: "The estate of a *legal* devisee is, under no circumstances, under the control of the court" (*n*). Whether, however, the same rule applies to legal estates or interests under a settlement to which the beneficiary in default is a party seems questionable. In *Woodyatt* v. *Gresley* (*o*), it was held that it did not. On the other hand, in the more recent case of *Re Brown*, *Dixon* v. *Brown* (*p*), KAY, J., said: "It has always been a rule of the Court of Chancery that if a trustee misappropriates trust money, and has an equitable interest under the trust deed, the court will not allow him to receive any part of the trust fund in which he is equitably interested under the trust, until he has made good his default as trustee. That is a doctrine which is not in the least in question, and is very thoroughly established. But if the trustee has, under the will *or other instrument* which created the trust, a legal interest in land which is not bound by the trust at all, then the Court of Equity has no power to lay hold of that legal interest or to assert anything in the nature of a lien or charge upon it in order to recoup the breach of trust."

PARAGRAPH (3).

Whether interest of married woman restrained from anticipation can be impounded.

It seems to be clear that, apart from s. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), beneficiaries have no right to demand that the interest of a beneficiary who has been party to a breach of trust shall be impounded to make good the loss to the trust estate, where she is a married woman restrained from anticipation (*q*). It is, however, submitted that s. 45 of the Trustee Act, 1893, enables the court, in the exercise of its discretion, to entertain such a demand where the breach has been committed at the instigation, or at the request, or with the written consent of such a beneficiary. No doubt the words of the statute confer this power on the court for the indemnity of *the trustee*, and not for the indemnity of the other beneficiaries; unless the concluding words, "or person claiming through

(*n*) *Fox* v. *Buckley*, 3 Ch. D. 508.
(*o*) 8 Sim. 180.
(*p*) 32 Ch. D. 597; and see also *Hallett* v. *Hallett*, 13 Ch. D. 232, and *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212.
(*q*) *Stanley* v. *Stanley*, 7 Ch. D. 589; *Hale* v. *Sheldrake*, 60 L. T. 291.

him," can be said to embrace the beneficiaries, which seems doubtful. But on the analogy of cases in which creditors of a trust business have been allowed to stand in the place of a trustee who has a right to be indemnified out of the trust estate (*r*), it is submitted that the beneficiaries ought to be allowed by way of subrogation to take the benefit of the indemnity which is given by the statute to a trustee in cases where that trustee is unable to make good the loss himself. If this be not so, it is, indeed, a strange anomaly that the authors of the Trustee Acts of 1888 and 1893, should have inserted a section dealing with the right of the trustee to impound the interest of a beneficiary *particeps criminis* by way of indemnity to himself, but should have omitted to make any similar statutory provision as to the rights of innocent *co-beneficiaries* to set off the loss against the share of the one in fault. Art. 81.

Art. 82.—*Following Trust Property into the Hands of Third Parties.*

(1) If trust property comes into the hands of any person inconsistently with the trust, he will be a mere trustee for the beneficiaries under the trust; unless he or some person through whom he claims (*s*), has *bonâ fide* acquired the property for valuable consideration, and without receiving notice before the transaction was completed (*t*), that the acquisition was a breach of trust, and—

(a) has got the legal (as distinguished from a mere equitable) title (*u*); or

(*r*) See *supra*, p. 349.

(*s*) *Harrison* v. *Forth*, Pr. Ch. 51; *Mertins* v. *Joliffe*, Amb. 313; *M'Queen* v. *Farquhar*, 11 Ves. 467.

(*t*) *Bassett* v. *Nosworthy*, 2 W. & T. L. C. 150; *Boursot* v. *Savage*, 2 Eq. 134; *Mackreth* v. *Symmons*, 15 Ves. 329; *Pilcher* v. *Rawlins*, 7 Ch. App. 259; *London, etc. Co.* v. *Duggan*, [1893] A. C. 506; and as to the time at which the notice is effectual, *Lady Bodmin* v. *Vandenbendy*, 1 Ver. 179; *Jones* v. *Thomas*, 3 P. Wms. 243; *Attorney-General* v. *Gower*, 2 Eq. Ca. Abr. 685, pl. 11; *More* v. *Mahow*, 1 Ch. Ca. 34.

(*u*) See *per* Lord Westbury, *Phillips* v. *Phillips*, 4 D. F. & J. 208; *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

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(b) the property being a chose in action (*x*), consists of a negotiable instrument (*y*), or an instrument which was intended by the parties to it to be transferable free from all equities attaching to it (*z*).

(2) A person who has notice of a trust is bound to see that it is discharged; and he will be liable if he accepts a forged discharge, however careful he may have been (*a*).

PARAGRAPH (1).

Relative rights of legal and equitable claimants.

The rule enunciated in this article is derived from two well-known maxims, viz.: (1) where the equities are equal the law prevails; and (2) as between mere equitable claimants *qui prior in tempore, potior in jure est*. In fact, where one of two innocent parties must suffer, then as equity is not called upon to interfere on behalf of either of them, the common law must take its course; and he who has got the legal estate, or its equivalent, will take priority over him who has a mere equitable claim, notwithstanding that the title of the legal claimant may have accrued after that of the equitable one. The rule is very strikingly and completely illustrated by the case of *Cave* v. *Cave* (*b*). There a trustee, who was a solicitor, fraudulently misappropriated the trust fund, and with it bought an estate which was conveyed to his brother. The brother then mortgaged the property, by legal, and afterwards by equitable mortgages, the solicitor trustee acting on all such occasions as the solicitor both for mortgagor *and mortgagees*. The parties beneficially entitled under the trust claimed to follow their

(*x*) *Turton* v. *Benson*, 1 P. Wms. 496; *Ord.* v. *White*, 3 Beav. 357; *Mangles* v. *Dixon*, 3 H. L. Cas. 702; *Doering* v. *Doering*, 42 Ch. D. 203.

(*y*) *Anon.*, Com. Rep. 43.

(*z*) *Re Blakeley, etc. Co.*, 3 Ch. App. 154; *Re General Estates Co., ib.* 758; *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374; and see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.

(*a*) *Jared* v. *Clements*, [1903] 1 Ch. 428.

(*b*) 15 Ch. D. 639; and see also *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555.

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trust money into the property which had been bought with it, on the ground that, as the solicitor of the mortgagees had notice of the breach of trust, that notice must be imputed to the mortgagees themselves. It was held, however, that, as the solicitor was a party to the fraud, notice of the equity of the beneficiaries could not be constructively imputed to the clients, the mortgagees; for the conduct of the agent raised a conclusive presumption that he would not communicate to the client the fact in controversy. Consequently their equities and the equity of the beneficiaries were equal; whence it followed, on the maxim "where the equities are equal the law prevails," that the legal mortgagee, having the legal estate, took priority over the beneficiaries, but that the latter took priority over the equitable mortgagees because their equity was first in point of date (*c*).

Notice of doubtful equity.

To deprive a person who has acquired for valuable consideration a legal right to property, the notice of a superior equity must be notice of facts which would clearly show the existence of such equity, at all events, to a lawyer. Thus, a *bonâ fide* purchaser for value is not bound by notice of a very doubtful equity; for instance, where the construction of a trust is ambiguous or equivocal (*d*).

Purchasing from two sets of trustees who are mortgagees under a contributory mortgage.

So, it has been held that where two sets of trustees have joined in advancing money on a contributory mortgage (on the face of which their fiduciary characters appeared), and they sell under their power of sale, the purchaser is not bound to see that each set of trustees get their due proportion of the purchase money—on the ground, apparently, that the purchase money is not the debt, but only a security for it (*e*).

Trust money paid in to trustee's private overdrawn account.

So, as has been already stated (*f*), where a trustee has overdrawn his banking account, his bankers have a first and paramount lien on all monies paid in by him, unless they have

(*c*) See also *Pilcher* v. *Rawlins*, 7 Ch. App. 259.
(*d*) *Hardy* v. *Reeves*, 5 Ves. 426; *Cordwell* v. *Mackrill*, Amb. 516; *Warwick* v. *Kniveton*, 3 Atk. 291; but see and consider *per* Lord Sr. Leonards, *Thompson* v. *Simpson*, 1 Dr. & War. 459.
(*e*) *Re Parker and Beech*, 56 L. J. Ch. 358, *sed quære*.
(*f*) *Supra*, pp. 385, 386.

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notice, not only that they are trust monies (*g*), but also that the payment to them constitutes a breach of trust (*h*).

Costs paid by defaulting trustee to his solicitor.

On similar grounds it has been held that the solicitor of a trustee is not debarred from accepting payments out of the estate in respect of costs properly incurred, unless notice be brought home to him that, at the time when he accepted them, the trustee had been guilty of a breach of trust, such as would preclude him from resorting to the trust estate for payment of costs (*i*). But where a solicitor receives money with knowledge of a breach of trust, a summary order may be made upon him to pay it into court, without the necessity of an action (*k*).

What constitutes notice.

The subject of notice is now governed by s. 3 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which is retrospective; consequently the old cases may be considered obsolete, except so far as they may throw light on the construction of the new rules. Notice is usually spoken of as either actual or constructive. Actual notice, under the new law, is defined as "an instrument, fact, or thing which is in the party's own knowledge." Constructive notice is defined as "an instrument, fact, or thing which would have come to the party's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, *or* which (in the same transaction with respect to which the question of notice arises) has come to the knowledge of his counsel, solicitor, or agent *as such*, or would have come to the knowledge of his solicitor or agent if such inquiries and inspections had been made as ought reasonably to have been made by them."

Actual notice.

With regard to actual notice, knowledge is absolutely necessary. Mere gossip or report is not sufficient. Whether the notice must be given by a party interested or his agent is perhaps doubtful. Lord ST. LEONARDS seemed to think that it

(*g*) *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282.
(*h*) *Coleman* v. *Bucks, etc. Bank*, [1897] 2 Ch. 243; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693; *Re Spencer*, 51 L. J. Ch. 271, but *cf. Mutton* v. *Peate*, [1900] 2 Ch. 79.
(*i*) *Re Blundell, Blundell* v. *Blundell*, 40 Ch. D. 370. *Cf.* p. 365, *supra*.
(*k*) *Re Carroll, Brice* v. *Carroll*, [1902] 2 Ch. 175.

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must. Mr. Dart, on the other hand, doubted it, and said it is one thing to say that "mere flying reports are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim, unless made by a party interested. The credibility of the informant must surely be considered; nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the court should not consider whether such notice must not have been present to his mind during the treaty." That passage was written by Mr. Dart before the passing of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), and that statute seems to adopt his view, as the definition of actual notice (therein differing from the definition of constructive notice) does not state that the instrument, fact, or thing, must have come to the party's knowledge in the *same* transaction, nor have been notified by a party interested. Indeed, it would seem that actual notice is entirely a matter of evidence; and if the court comes to the conclusion that a party had in fact, at the date of the transaction, such knowledge as would operate on the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired, then he will be taken to have had actual notice. Whether he acquired his knowledge before or at the time of the transaction, and whether he acquired it from a party interested or not appears to be immaterial (*l*).

Constructive notice.

With regard to constructive or imputed notice, on the other hand, it is quite clear that a man is not liable for notice acquired by his counsel, solicitor, or agent, unless it has come to their knowledge in the very transaction with respect to which the question of notice arises. The fact that a solicitor has been in the habit of acting for a particular person cannot reasonably constitute that solicitor the agent of the client to bind him by receiving notices or information; for apart from the burden which it would impose on the memory of a solicitor, *non constat* that the client may not have ceased to regard him as his

(*l*) *Lloyd* v. *Banks*, 3 Ch. App. 448; and see also *London, etc. Co.* v. *Duggan*, [1893] App. Cas. 506, and *Redman* v. *Rymer*, 60 L. T. 385.

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solicitor (*m*). It has also been held that constructive notice of an equity through counsel, solicitor, or agent, is not imputed to the client, where the counsel, solicitor, or agent is party to a fraud which would be exposed if he had communicated the notice to his client (*n*). This case must, however, be carefully distinguished from the earlier cases of *Boursot* v. *Savage* (*o*) and *Bradley* v. *Riches* (*p*), which seem at first sight in direct conflict with it. The point in *Boursot* v. *Savage* was, that where a client has *notice of the existence of a trust*, and intends to get the equitable interests of beneficiaries *from them*, the fact that he gets the legal estate from a trustee who happens to be his solicitor, does not protect him if the solicitor forges the signatures of the beneficiaries. For he had notice of the equitable interests, and the fact that he was the innocent victim of a forgery does not give him an equal equity with the beneficiaries. In *Bradley* v. *Riches* the point decided was, that the presumption that a solicitor has communicated to his client facts which he ought to have made known is not rebutted by proof that it was the solicitor's *interest* to conceal the facts. There the fact omitted to be communicated was the existence of a valid mortgage ; whereas in *Cave* v. *Cave* the fact omitted to be communicated was the prior commission of a fraud by the solicitor himself (*q*).

Omission to make inquiries and inspections.

There is another species of imputed notice mentioned in the Conveyancing Act of 1882, of quite as much importance as that mentioned in the last illustration, viz., notice of "an instrument, fact, or thing which would have come to the party's knowledge, or to the knowledge of his solicitor or agent (not his counsel), if such inquiries or inspections had been made as ought reasonably to have been made by them." Thus, it has been held that whenever a purchaser, mortgagee or lessee, foregoes his strict right to title, whether by express contract *or even by not negativing implied statutory conditions*, he runs the risk of having constructive notice imputed to

(*m*) *Saffron Walden, etc. Society* v. *Rayner*, 14 Ch. D. 406.
(*n*) *Cave* v. *Cave*, 15 Ch. D. 639, cited as the 1st Illustration to this Article.
(*o*) 2 Eq. 134.
(*p*) 9 Ch. D. 189.
(*q*) And see also and dist. *Lloyd's Bank* v. *Bullock*, [1896] 2 Ch. 192.

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him of anything contained in any of the documents which he ought to have examined (*r*). It must also be borne in mind, that notice of the existence of a deed affecting the title, or which *necessarily* affects it, is notice of its contents if it can be got at. "Of course there may be cases where the deed cannot be got at, or for some other reason where, with the exercise of all the prudence in the world, you cannot see it, and then there will be no constructive notice affecting the title. There is also a class of cases, of which I think *Jones* v. *Smith* (*s*) is the most notorious, where a purchaser is told of a settlement which may or may not affect the title, and is told at the same time that it does not affect it, and in such cases there is no constructive notice (*t*). Supposing, as in *Jones* v. *Smith*, you are buying land of a married man, and you are told at the same time that there is a marriage settlement but that it does not embrace the land in question, you have no constructive notice of its contents. Because, although you know there is a settlement, you are told it does not affect the land at all. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents if you are told at the same time that it does not affect the land" (*u*). A similar instance of the same rule occurs in the case of mortgages, where the purchase-money is expressed to be advanced by several mortgagees on a joint account. No doubt in ninety-nine cases out of a hundred such mortgagees are trustees; but as there is nothing on the face of the deed to show that the money is trust money, and as the fact of persons advancing money on a joint account does not necessarily imply that it is trust money, a purchaser or transferee never inquires whether there is a trust (*v*).

(*r*) *Patman* v. *Harland*, 17 Ch. D. 353.

(*s*) 1 Hare, 43.

(*t*) *A fortiori* where he has no notice of the existence of any settlement. For instance, there is a dictum of Pearson, J., to the effect that a person dealing with a married woman is not bound to inquire whether she has a marriage settlement or not: *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221.

(*u*) *Per* Jessel, M.R., *Patman* v. *Harland*, *supra*.

(*v*) *Re Harman and the Uxbridge and Rickmansworth Ry. Co.*, 24 Ch. D. 720.

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In addition to documents, constructive notice may be imputed to a purchaser from the state, appearance or occupation of property. For instance, the existence of a seawall bounding property has been held to give constructive notice of a liability to keep it in repair (*x*). So notice of a tenancy is notice of its terms; and generally, where a person purchases property where a visible state of things exists, which could not legally exist, or is very unlikely to exist without the property being subject to some burden, he is taken to have notice of the nature and extent of the burden (*y*).

Absence of notice will not protect a volunteer.

If an alienee of trust property is a volunteer, then the estate will remain burdened with the trust, whether he had notice of the trust (*z*) or not (*a*); for a volunteer has no equity as against a true owner.

Transfer of fund into court equivalent to alienation for value.

However, some transfers, apparently voluntary, have been held to be equivalent to alienations for value. Thus, in *Thorndike* v. *Hunt* (*b*), a trustee of two different settlements having applied to his own use funds subject to one of the settlements, replaced them by funds which, under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into court; and it was held by the Court of Appeal that the transfer into court was equivalent to an alienation for value without notice, and that the beneficiaries under the other settlement could not follow the trust fund.

Part of trust fund in court transferred to a separate account.

So incumbrancers on a fund in court which has been transferred to a separate account before the incumbrances were created, are not postponed to prior equitable claims of other beneficiaries under the same settlement, subsequently discovered (*c*). For, when a fund is carried over to a separate

(*x*) *Morland* v. *Cook*, 6 Eq. 252.
(*y*) *Allen* v. *Seckham*, 11 Ch. D. 790.
(*z*) *Mansell* v. *Mansell*, 2 P. Wms. 678.
(*a*) *Ib.*; *Spurgeon* v. *Collier*, 1 Eden, 65.
(*b*) 3 D. & J. 563; and see *Case* v. *James*, 3 D. F. & J. 256; and *Dawson* v. *Prince*, 2 D. & J. 41.
(*c*) *Re Eyton*, *Bartlett* v. *Charles*, 45 Ch. D. 458.

account in an action for administering the trust, it is released from the general questions in the action and becomes earmarked as being subject only to the questions arising upon the particular matter referred to in the heading of the account (*d*). All other questions are in fact treated as *res judicata*. The fund has been awarded by the court to the parties falling under the heading of the separate account, and it is too late for others to try to upset the court's award. It is in fact equivalent to a transfer of the legal estate or interest. Art. 82.

A purchaser with notice from a purchaser without notice is safe. If he were not, an innocent purchaser for value would be incapable of ever alienating the property which he had acquired without breach of duty; and such a restraint on alienation would necessarily create that stagnation against which the law has always set its face (*e*). Purchaser with notice from purchaser without.

Where a trustee, holding a mortgage (*f*) or a lease (*g*), deposits the deed with another to secure an advance to himself, the lender will have no equity against the beneficiaries however *bonâ fide* he may have acted, and however free he may have been of notice of the trustee's fraud. For he has not got the legal estate, and therefore his equity, being no stronger than that of the *cestuis que trusts*, the maxim, "*Qui prior in tempore, potior in jure est*" applies. Where equities are equal and no legal estate in either claimant.

On the same principle, where a trustee has wrongfully spent trust funds in the purchase of property, which he has afterwards sold to a third party without notice, then, if the legal estate has not been conveyed to the third party, the beneficiaries will have priority over him (*h*). For they have a right (as has been shown in Art. 72) to follow the trust fund into the property into which it has been converted, and to take it or to have a charge upon it, at their election; and as their right was prior in time to that of the third party,

(*d*) *Per* Lord Langdale, M.R., *Re Jervoise*, 12 Beav. 209.
(*e*) See *Brandlyn* v. *Ord*, 1 Atk. 571; *Lowther* v. *Carlton*, 2 *ib.* 242; *Peacock* v. *Burt*, 4 L. J. Ch. 33, but the doctrine is not to be extended (*West London Bank* v. *Reliance, etc. Society*, 29 Ch. D. 954).
(*f*) *Newton* v. *Newton*, 4 Ch. App. 143; and *Joyce* v. *De Moleyns*, 2 J. & L. 374.
(*g*) *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93.
(*h*) *Frith* v. *Cartland*, 2 Hem. & M. 417.

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and as he has not got the legal estate, the maxim above referred to applies (*i*).

Choses in action are assigned subject to all equities.

It is upon this principle that choses in action are generally taken subject to all equities affecting them. Thus, in *Turton* v. *Benson* (*k*), a mother agreed to give her son, on his marriage, as a portion, a sum equal to that with which his intended father-in-law should endow the intended wife. The son, in order to induce the mother to give him a larger portion, entered into a collusive arrangement with the father-in-law, whereby, in consideration of the latter nominally endowing his daughter with £3,000, the son gave him a bond to repay him £1,000, part of it. This bond, being made upon a fraudulent consideration, was void in the hands of the father-in-law, and it was held that, being a chose in action, he could not confer a better title upon his assignee.

Negotiable instruments.

Negotiable instruments are, however, an exception to the rule as to choses in action passing subject to all prior equities. For the *common law*, with regard to them, adopted the custom of merchants, and recognised that such instruments were transferable. Consequently, the transferee of a negotiable instrument has a legal, as well as an equitable, interest; and where the equities are equal he is protected against prior equities by his legal title (*l*). Of course, however, where the transferee has notice (express or imputed (*m*)) of prior equities, he will be postponed.

Bonâ fide purchasers from trustees cannot after

The *bonâ fide* purchaser of an equitable interest, without notice of an express trust, cannot defend his position by subsequently, and after notice, getting in an outstanding legal

(*i*) And see as to deposit of share certificates with blank transfers forming part of a trust estate, *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555.

(*k*) 1 P. Wm. 496.

(*l*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201. It is not infrequently a task of difficulty to determine whether debentures issued by public companies are negotiable instruments passing free from undisclosed equities or not. As to this, the reader is referred to *Re Natal Investment Co.*, 3 Ch. App. 355; *Re General Estates Co.*, *ib.* 758; and *Re Romford Canal Co.*, 24 Ch. D. 85.

(*m*) See *Lord Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333.

Art. 82.

notice get legal estate from them.

estate *from the trustee;* for by so doing he would be guilty of taking part in a new breach of trust (*n*). But if he can perfect his legal title without being a party to a new breach of trust (as, for instance, by registering a transfer of shares which have been actually transferred before notice, or by getting in the legal estate from a third party), he may legitimately do so (*o*).

(*n*) *Saunders* v. *Dehew*, 2 Vern. 271; *Collier* v. *M'Bean*, 34 Beav. 426; *Sharples* v. *Adams*, 32 Beav. 213; *Carter* v. *Carter*, 3 Kay & J. 617.

(*o*) *Dodds* v. *Hills*, 2 Hem. & M. 424.

THE END.

QUESTIONS

ON

UNDERHILL'S TRUSTS.

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NOTE.

These questions have been drawn up with a view to assisting students in mastering the principles of the Law of Trusts and in testing their knowledge of that subject by reference to the pages of the present work. They are not, therefore, necessarily such questions as it would be fair to set in an examination, though most of them would probably be suitable for that purpose. The numbers at the end of each question give the pages where the required information can be found.

QUESTIONS ON UNDERHILL'S TRUSTS.

1. Define "trust," "*cestui que trust*," and "breach of trust." [1, 2]

2. By whom can the obligations arising under a trust be enforced? [1, 2]

3. Under what circumstances (if any) can a man be a trustee for himself? Would it make any difference if the same person were also the creator of the trust? [2, 5]

4. What is a breach of trust? In what respects does it differ from a tort? [2, 4, 404—406]

5. Is it essential that a trustee should be the legal owner of the trust property? Give instances in support of your answer. [3, 6, 37, 38, 45]

6. Distinguish between trusts and (*a*) bailments, (*b*) other contracts relating to property. [3]

7. Distinguish between equitable interests and legal ownership. Is the distinction of any importance at the present time? [5—7, 419—421, 427—429]

8. To what extent has the Judicature Act of 1873 affected the interest of a beneficiary in trust property? [6]

9. Define and (where necessary) distinguish between—

"Express trust."
"Constructive trust."
"Precatory trust."
"Implied trust."
"Resulting trust."
"Simple trust."
"Special trust." [8—11]

10. What is the difference between an active trustee and a passive trustee? Give an instance of each. [10, 11]

11. What matters are essential to the *primâ facie* validity of an express trust? [12, 13]

12. On what grounds and at whose instance may an express

trust, which is *primâ facie* valid, be nevertheless impeachable? [12, 13]

13. What expressions are necessary for the creation of an express trust? [14]

14. What is the result if in declaring a trust a testator fails to define what property is to be subject to it? [14, 17]

15. Will a trust ever be allowed to fail for want of a trustee? [16, 17, 34]

16. Discuss the validity of a bequest of a sum of money to trustees to be employed in keeping up the testator's tomb until the expiration of the period of twenty-one years from the death of the survivor of all persons living at the testator's death. [18, 74]

17. What is the practical difference between the effect in a trust of uncertainty with regard to (*a*) the property to be subject to the trust, (*b*) the persons to be benefited thereby? [18]

18. When can a trust be created by an agreement? Give instances. [14, 18—20]

19. When is a trust created by giving a power of appointment? [15, 20, 21]

20. Would the bequest of a sum of 500*l.* "to A. for life and after his death among his children, as he may by will appoint, and in default of any such appointment among them equally," create a trust in favour of A.'s children? [15, 20, 21]

21. What is a precatory trust? Discuss the history of precatory trusts with reference to the *fidei commissa* of Roman law and the origin of English trusts. [15, 21—23]

22. What is the difference between the attitude of the courts at the present day and their attitude in the 17th and 18th centuries with regard to the use of precatory words in the constitution of trusts? [15, 21—31]

23. Is the question, whether a so-called "precatory trust" is to be considered a duly constituted trust, a question of law or of interpretation? State the modern rule on the subject. [15, 21—24, 27—31]

24. Discuss the effect of a bequest to the testator's widow, coupled with the words, "feeling confident that she will ultimately divide the same justly amongst our children." Does this constitute a trust? [27—31]

25. What is an illusory trust? [32]

26. Does the execution by a debtor of a "trust deed" for payment of his creditors constitute them beneficiaries with power to enforce its provisions—(*a*) when they are parties to the deed; (*b*) when they are not? In the latter case, would the fact of their having had notice of the deed and acquiescing in it make any difference? [32, 33]

27. Under what circumstances (if any) can a "trust deed"

for payment of creditors be revoked by the settlor (the debtor)? [32, 33]

28. Are all persons to whom (in a settlement) payments are directed to be made necessarily beneficiaries under the trust? [32, 33]

29. Where in a settlement the costs and charges incidental thereto are directed to be paid, can the solicitor who prepared the deed enforce the trust by taking proceedings against the estate as a beneficiary? [32, 33]

30. Which (if any) of the following constitute a trust?—

(*a*) A conveyance of freeholds to A. and his heirs to the use of B. and his heirs. [1, 2]

(*b*) A declaration in writing by A. that he holds a sum of 1,000*l.* Consols standing in his own name, and belonging to him, in trust for himself for life and after his death for his wife absolutely. [5]

(*c*) A direction in a will to the trustees thereof to employ A. as agent of the trust estate and pay him out of the income thereof an annual salary of 200*l.* for his services. [34]

31. What is a voluntary trust? Under what circumstances will a voluntary trust be enforced by the courts? [34]

32. Discuss the maxim that "equity gives no assistance to volunteers," and define the word "volunteers" as used in this connection. [35, 36, 42, 43]

33. Distinguish between executory and executed trusts. What is the importance of the distinction? [35, 37, 102—108]

34. A voluntary settlement contained a covenant to surrender certain copyholds to the trustees to be held by them upon the trusts of the settlement. Would a court of equity enforce such a covenant at the instance of the beneficiaries named in the settlement? [36]

35. A marriage settlement (after the usual provisions in favour of husband, wife, and issue) contained provisions in favour of distant relatives of the husband. Could such relatives enforce such provisions? [37]

36. A person entitled under a will to an equitable reversion in residuary personalty assigns the same by a voluntary deed upon trusts in favour of a friend, the legal ownership remaining in the trustees of the will. Can such a trust be enforced by the friend or revoked by the settlor? [37, 38]

37. In what cases (if at all) can a declaration of trust be implied from conduct? [39]

38. Distinguish (both as regards their natures and effects) between (*a*) a declaration of trust, and (*b*) an instrument purporting to be an assignment to trustees, but invalid as such. [40, 41]

39. A father having just received a cheque payable to his order (but as yet unindorsed), shows it to his infant daughter and says, "I will put this by for you; it is for yourself," and keeps it accordingly, without indorsing it. Does this constitute an enforceable trust? [41]

40. At whose instance, and in favour of whom (if at all), can an executory trust be enforced (*a*) if it is founded on valuable consideration, (*b*) if not so founded? [35, 36, 42—44]

41. In the case of an executory trust founded upon valuable consideration, what persons have been held to be "privy" to such consideration? [35, 42, 43]

42. At whose instance (if at all) can a covenant (contained in a marriage settlement) to settle property which may be acquired by the wife after the marriage, be enforced? [35, 43]

43. A deed of partnership between two persons provided that a certain annuity was to be paid by the surviving partner to the widow of the partner who should die first. Discuss the validity of this as a trust. [44]

44. What exceptions are there to the principle that every kind of property is capable of being the subject of a trust? [44—48]

45. A. owes 1,000*l.* to B. Can B. create a valid trust of his interest therein? [45]

46. What is the effect of a trust created for an illegal purpose? Give instances of purposes which have been held to be illegal. [48, 49]

47. What is the meaning of "accumulation," and to what extent is it permissible? [48, 50—52]

48. State the "rule against perpetuities," and mention any exceptions to it. [49, 50]

49. Discuss the validity of a trust containing a proviso that the interests of the beneficiaries shall not be liable to the claims of their creditors. [48, 52]

50. Discuss the validity of the following: (*a*) a settlement of money by A. for the benefit of B. until B. shall become bankrupt, with a gift over in that event; (*b*) a settlement by A. for his own benefit, until he shall become bankrupt, with a gift over in that event. [52]

51. In an ante-nuptial marriage settlement, where part of the property is brought in by the husband and part by the wife, to what extent and by what means is it possible to protect any interest conferred upon the husband from the husband's creditors? [52]

52. Discuss the validity of a trust containing a proviso that the interests therein given shall not be alienated by the beneficiaries. [53]

53. In what respect is a married woman, who is made a beneficiary under a trust, liable to be placed by the settlor under

greater restrictions than would be possible if she were unmarried? [53]

54. By what means (if at all) is it possible to provide against voluntary alienation by a beneficiary of his interest under a trust? [53, 301, 302]

55. In what cases are provisions in favour of illegitimate children (*a*) valid and (*b*) invalid; and on what grounds? [53, 54]

56. Is a trust, made dependent upon the separation of a husband and wife, ever valid? [54]

57. What is meant by a trust tending to the general restraint of marriage? Is such a trust ever valid? [49, 54—56]

58. Discuss the validity of the following gifts of income in trust for a spinster: (*a*) until she shall marry; (*b*) for life, with a proviso that, if she shall marry a named person, the income shall be paid to someone else; (*c*) for life with a proviso that, if she shall marry a shopkeeper, the income shall be paid to someone else. [54—56]

59. Does an illegal trust vitiate other provisions contained in the same settlement? [49, 56]

60. If the consideration for a trust is illegal, but its other provisions are legal, is such a trust enforceable? [56]

61. What is the effect of the inclusion in the same instrument of trusts, some of which are legal and some illegal, (*a*) when the two are alternative, depending on a contingency; (*b*) when the legal purposes are to take effect in remainder on the failure of the illegal or *vice versâ*? [56—58]

62. Discuss the validity of trusts in remainder to take effect—(*a*) on the failure of provisions which are void for remoteness; (*b*) on the cessation of an accumulation which is directed for a period longer than the law allows. [56—58]

63. A settlement contains a trust for sale which is void for remoteness but the beneficial interest in the proceeds are vested absolutely within the legal limit. Discuss the validity of the settlement. [58]

64. A settlement directs the accumulation of income for a period longer than the law allows; after which the accumulations and the capital are directed to be divided amongst certain persons. What is the effect of such a provision as regards the income arising between the statutory period and the date for division fixed by the settlement? [58]

65. Will a trust of personalty intended to take effect under English law be enforced by our courts if made by a foreigner domiciled in a country whose laws do not permit such dispositions? [49, 58, 59]

66. Is the capacity to make a settlement in any degree dependent upon the law of the domicile of the intending settlor? [49, 59]

67. An Englishwoman under the age of twenty-one enters into a

marriage settlement upon her marriage with a foreigner domiciled abroad. Is she bound by the settlement under our law? Would she be bound if her husband had been an Englishman domiciled in England? [59]

68. What precautions should be observed in the case of a marriage settlement made on the marriage of an Englishwoman with a foreigner domiciled abroad? [60, 61]

69. Is writing necessary to the creation of an express trust? [60—62]

70. A creditor verbally requested his debtor to hold the debt in trust for a third person. Is this a valid declaration of trust? [60, 62]

71. A testator left all his property by will to his solicitor, whom he verbally informed that he wished him to act as his trustee, which the solicitor agreed to. After the testator's death, a letter signed by the testator was found directing how the property should be dealt with. What is the legal effect of this transaction as regards the beneficial interest in the property? [62—64]

72. Vary the facts of the preceding question by supposing that during the testator's lifetime the solicitor had no knowledge of the testator's will or intentions: what would then be the effect? [63]

73. A testator leaves his property to a friend, adding the words "in the full confidence that he will carry out my wishes in respect thereof." The friend survives the testator, but dies before the distribution of the estate. Is parol evidence that the testator had verbally communicated his wishes to his friend admissible? And what happens to the property? [64]

74. A man is induced by his eldest son not to make a will, the son promising to provide for the younger children. Can the latter claim any part of the property which devolves on the eldest son as heir? [61, 64—66]

75. Illustrate the doctrine that "even an Act of Parliament shall not be used as an instrument of fraud." [61, 64—66]

76. By expressly promising to carry out B.'s wishes, A. induces B. (1) to make or (2) not to revoke, a will leaving his property to A. and C., (*a*) as tenants in common, or (*b*) as joint tenants. Assuming C. to have known nothing of the matter till after B.'s death, what interests do A. and C. respectively take in each of these four cases? [66]

77. A. induces B. to assign a lease to him on the verbal understanding that he will hold it in trust for B. Is this an enforceable trust? [67]

78. What persons are incapable of creating a trust? [68—72]

79. Under what circumstances can an infant make a settlement so as to bind himself (or herself)? [68, 69]

80. Is a settlement made by an infant binding, voidable or altogether void? [68, 69]

81. An ante-nuptial settlement contains a covenant by the husband to settle or concur in settling any property which his wife (then an infant) may after the marriage acquire. Does this bind any such property, if the wife on attaining twenty-one repudiates the settlement? [69, 70]

82. To what extent and under what circumstances can a married woman create a binding trust—(*a*) if married in 1880; (*b*) if married in 1890? [70, 71]

83. What kinds of property is a married woman (married since the 31st December, 1882) entirely prevented from alienating during coverture, even with the consent of her husband? [70, 71, 295]

84. When are (*a*) the joinder of the husband and (*b*) "acknowledgment" of the deed by the wife necessary for the creation of a trust by a married woman? [71]

85. What corporations (if any) can create trusts? [71]

86. Under what circumstances (if at all) would a settlement made by a lunatic be binding? [71]

87. A man executes a settlement on his "marriage" with his deceased wife's sister. Is the settlement valid? [71, 117, 118]

88. Under what circumstances (if at all) can a person who has been sentenced to penal servitude for a felony create a valid trust? [72]

89. Who may be a beneficiary under a trust? [72—76]

90. In what way does the position of a corporation as beneficiary under a trust differ from that of an individual? [72, 73]

91. In what way does the position of an alien as beneficiary under a trust differ from that of a British subject? [73]

92. Compare the rights of married women in relation to property—(*a*) before 1883; (*b*) since 1883. [70, 71, 73, 74]

93. What is meant by a "restraint on anticipation"? When is it applicable, and how can it be removed? [53, 73, 74]

94. Can a trust be created for purposes which cannot possibly benefit any human being? Is such a trust enforceable or void? [72, 74—76]

95. Discuss the validity of provisions in wills for—(*a*) the erection of a tomb for the testator; (*b*) keeping the same in repair for ever; (*c*) payment of an annual sum to a charity upon condition of keeping such tomb in repair, with a gift over to another charity in the event of the first neglecting the condition. [72, 74]

96. Is a testamentary trust providing for the testatrix's pet dogs legal? By whom can it be enforced? [75]

97. After the execution of a marriage settlement the engagement is broken off. Is the settlement binding, void or voidable, and if the latter, at whose instance? [76, 77, 115]

98. Under what circumstances will the Court (*a*) cancel or

(*b*) rectify a settlement executed by mistake? On whom does the onus of proof lie in such cases? [76—79]

99. A wife, with a view to more conveniently carrying on an adulterous intrigue (of which her husband is ignorant) induces him to execute a deed of separation. Is the deed binding on the husband? [76, 80]

100. Explain what is meant by "undue influence" inducing the creation of a trust. Under what conditions will a trust so created be cancelled? On whom does the onus of proof lie in such cases? [76, 80—84]

101. A client settles 500*l.* a year on his solicitor's wife. Is this binding? [76, 81, 82]

102. A spinster over the age of twenty-one makes a settlement of half of her property in favour of her widowed mother. Discuss the validity of such a settlement. [76, 82]

103. Is a power of revocation necessary to the validity of a voluntary settlement? [77, 78, 83]

104. To what extent is acquiescence in a voidable settlement a bar to relief? Give instances. [76, 83, 84]

105. What is meant by *restitutio in integrum* in relation to the cancellation of a settlement? [76, 84]

106. A man executes an ante-nuptial marriage settlement upon his marriage with a woman who represents herself to be a widow. It afterwards turns out that she had been divorced by her previous husband for adultery. Is the settlement binding? and, if so, on what grounds? [76, 84]

107. Under what circumstances is a trust void as against (*a*) the settlor's creditors; (*b*) the settlor's trustee in bankruptcy; and (*c*) subsequent purchasers from the settlor? [84—101]

108. A man, knowing himself to be insolvent, executes an ante-nuptial settlement of all his property and marries a woman who knows nothing of his financial difficulties. Is the settlement valid? [85, 91, 92]

109. To what extent does delay bar an action to set aside a settlement which is void as against the settlor's creditors under 13 Eliz. c. 5? [85]

110. In what respects does a voluntary post-nuptial settlement stand on a different footing from an ante-nuptial marriage settlement, as regards the possibility of their being subsequently attacked by the husband's creditors and trustee in bankruptcy? [85, 91—95]

111. A man settles (*a*) his own property, (*b*) property which has come to him in right of his wife, in trust for himself until bankruptcy, with a gift over in that event to the wife. On what grounds, and by whom, is either provision open to be attacked? [52, 90, 96, 97]

112. An ante-nuptial marriage settlement contained a covenant by the husband to bring into settlement at a certain subsequent date a certain specified sum, which at the time of the settlement the settlor did not possess, but which he expected would be bequeathed to him by an elderly relative. In what events would such arrangement hold good, and under what circumstances would it be void? [93—96]

113. To what extent (since 1893) is a settlement of land void as against a subsequent purchaser thereof from the settlor? [97—101]

114. A man, by a voluntary deed, constitutes himself a trustee of his lands in favour of himself for life, with remainder in trust for his son. The son then sells his interest to a purchaser, and subsequently the father contracts to sell the fee simple to another purchaser. Discuss the rights of the parties on the assumption that these transactions took place before 1893, and that both the father and the son, but neither of the purchasers, were concerned in the fraud. [97—101]

115. Distinguish between an executed and an executory trust, and explain the difference that exists between the modes of construction applicable to them respectively. [102—108]

116. What is the effect of a covenant (contained in marriage articles) to settle estates to the use of the husband for life, with remainder to the wife for life, with remainder to their heirs male and the heirs of such heirs male? [104, 105]

117. A testator gave 300*l.* to trustees upon trust to lay it out in the purchase of lands, and to settle such lands to the use of M. and her children, and if M. died without issue, "the land to be divided between her brothers and sisters then living." What interest does this give to M.? [105, 106]

118. Constructive trusts have been divided into resulting and non-resulting trusts. Explain and illustrate this distinction. [109, 110]

119. A will contained an appointment of trustees and a devise of realty to them as such, but omitted to declare any trusts of the realty. What is the effect of such a disposition? [111, 112]

120. What happens if land is devised to one "upon trust" to pay certain debts, and it turns out that the value of the property devised is greater than the amount of the debts? [113, 114]

121. Land is conveyed to a trustee upon trusts, either (1) not declared or evidenced in writing, or (2) which fail by reason of uncertainty. What happens to the property? [114, 115]

122. A testator bequeathed money to D. absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is well acquainted." Is parol evidence admissible to show that D. was to take beneficially? If, after satisfying the

purposes communicated to D. by the testator, there is a surplus, what becomes of it? [64, 112—115]

123. When a settlor has intentionally vested property in a trustee for an illegal purpose, under what circumstances (if at all) can he recover it? [116—121]

124. A man contemplating marriage with his deceased wife's sister settles personal property upon her, then goes through the ceremony of marriage with her (which both know to be illegal), and afterwards lives with her as his wife. Can the settlement be set aside after his death at the instance of his personal representatives? [117, 118]

125. A settlor transfers property to trustees upon trusts which contravene the rule as to perpetuities. Can he recover the property? [117, 120]

126. Explain the doctrine of equity as to purchases made in the name of another person. To what extent is parol evidence admissible in such cases? [121—128]

127. Property is purchased by and conveyed to A., who has borrowed half the money for the purpose from B. What are B.'s rights? [121, 122]

128. Two brothers, A. and B., join in buying property, A. paying two-thirds and B. one-third of the price, but the conveyance being made to A. only. What are the rights of the parties? [121, 122]

129. A father transferred some stock from his own name into the joint names of his son and a broker, and told the latter to carry the dividends to the son's account. Subsequently the father bequeathed the stock to his daughter. Discuss the rights of the parties. [121, 123]

130. A married woman, out of her separate estate, made a purchase in the name of her children. What is the presumption of equity as to the beneficial interest in the property purchased? [121, 125—127]

131. What is the presumption of equity in a case where a man buys property (which is conveyed to him in his own name) with money that is drawn by his wife from a banking account kept up from the income of her separate property? [121, 127]

132. A man with his own money buys property in the name of his illegitimate son. What is the presumption of equity arising on this transaction? [121, 127—128]

133. When there is a resulting trust, to whom does the beneficial interest result where the resulting trust arises under (*a*) an instrument *inter vivos*, (*b*) a will? [128—133]

134. State the rule in *Ackroyd* v. *Smithson*. [128—130]

135. Give an instance of a resulting trust under a marriage settlement. [128, 129]

136. A testator devises real estate to trustees upon trust to sell

and divide the proceeds between his nephews B. and C. B. dies in the testator's lifetime. What becomes of the proceeds of sale? [128—131]

137. A testator bequeaths personal estate upon trust to purchase real estate, which he directs to be held upon certain trusts, some of which eventually fail. What becomes of the land in regard to which the trusts have failed? [128, 130, 131]

138. A testator devises his realty upon trust for sale, the proceeds to be held upon certain further trusts some of which ultimately fail. After the sale, but before the failure of these trusts, the testator's heir-at-law dies intestate. What becomes of the property in regard to which the trusts have failed? [128, 129, 131, 132]

139. A testator bequeaths personalty upon trust for his widow during her life and at her death to be laid out in the purchase of land, which is to be held on certain further trusts. The testator's son (and sole issue), having survived the testator, dies intestate and a widower leaving (as his sole issue) three children, all of whom are still living. Subsequently the further trusts declared in the will either (*a*) partially or (*b*) wholly fail; and thereafter the testator's widow dies. What then happens to the property left undisposed of (*a*) if the said trusts have partly failed, (*b*) if they have wholly failed? [129, 132, 133]

140. Distinguish between the effects, in equity, of (*a*) a power to convert and (*b*) a trust for conversion. [133]

141. Give three instances of a constructive non-resulting trust. [134—144]

142. Explain and illustrate the principle that a person in a fiduciary position is not allowed to make any personal profit thereby. [134—137]

143. A man holding some leasehold property in trust for an infant beneficiary applied, on the expiration of the lease, to the lessor for a renewal, which the lessor refused to make to the infant as the latter could not enter into valid covenants. The trustee then took a lease to himself for his own benefit. Discuss the effect of this transaction. [134]

144. A tenant for life of lands accepts a sum of money from a railway company in consideration of his offering no objection to an Act of Parliament enabling them to make a branch line which will be detrimental to the property. Can he retain the money for himself? [134, 136]

145. A director of a company buys property and sells it at a profit to the company. Is such a transaction valid? [134, 137]

146. After a binding contract of sale what is, in equity, the relation between the vendor and the purchaser while the purchase money is (in whole or in part) unpaid, assuming (*a*) that the property

has been conveyed to the purchaser, or (*b*) that it has not yet been conveyed? [138, 139]

147. A. sells and conveys an estate to B., taking B.'s promissory note for the amount of the purchase-money. What are A.'s rights in relation to the property if the promissory note when due remains unpaid? [139]

148. A man, having mortgaged his lands to two different persons in succession, pays off the first mortgagee and gets a reconveyance from him. What are the rights of the second mortgagee? [139]

149. A tenant for life pays off a mortgage on the fee simple of the property. After his death his next-of-kin attempt to claim the mortgage debt from the remainderman. Is the claim valid? [140]

150. A tenant for life desires to advance out of his own pocket a sum of money urgently necessary to prevent actual loss to the property, but wishes to charge it on the estate. Has the court (apart from statutory authority) any jurisdiction to sanction such an arrangement without the consent of the persons entitled in remainder? [141]

151. When is an agent a trustee for his principal? [141, 142]

152. Is a solicitor a trustee for his client in respect of (1) money handed to the solicitor by the client for investment; (2) money received by the solicitor in payment of a debt due to the client, which he has been instructed to collect and pay over at once to the client? [142]

153. A man obtains property from another by fraud. What are the rights of the parties in relation to the property? [143]

154. Is anyone bound to become a trustee? [145—147]

155. How and when can a trust be disclaimed? [145—147]

156. Is it possible to accept part of a trust while disclaiming the rest? [146, 149]

157. A man agrees with another to become the latter's executor. Is the promise binding on the former. [146]

158. How can acceptance of a trust be signified or proved? Is mere acquiescence enough? [147—149]

159. Give instances where the acceptance of a trust has been inferred from conduct. [147—149]

160. When does a trustee take a legal estate in the trust property? How does the Statute of Uses affect his position in this respect? [150—153]

161. Freeholds are devised to trustees in one case—(*a*) "in trust to pay the rents and profits" to A. B.; and in another case (*b*) "in trust to permit and suffer A. B. to take the rents and profits"; and in another (*c*) "in trust to permit and suffer A. B. to take the *net* rents and profits." What estate (if any) do the trustees take in each case? [150, 151]

162. Does a devise to trustees followed by a power of sale necessarily give the trustees a legal estate in the property? [150, 153]

163. Assuming trustees to take some legal estate in the property, what considerations determine the quantity of that estate? [154—160]

164. What is the difference in construction (as between deeds and wills) on the question of the quantity of estate taken by trustees under the instrument creating the trust? [154—160]

165. Give an instance of the importance (in view of the rule in *Shelley's Case*) of determining the quantity of the estate taken by trustees. [157, 159, 160]

166. Will a larger estate ever be implied in trustees than the trust requires? [154, 155, 157]

167. When there are recurring trusts, under what circumstances do the trustees take a fee simple? [159—161]

168. What effect has the bankruptcy of the trustee upon the trust and trust property and upon his position as trustee? [160, 161, 312, 317, 318, 381—383, 387]

169. A trustee, having converted the trust property into money and paid it into an account at a bank, becomes bankrupt. Does the latter fact affect the interest of the beneficiaries? [161, 381, 382]

170. What are the incidents of the estate of the trustee at common law, and to what extent have they been affected by statute? [161—163]

171. A trustee in pursuance of the trust carries on a business for the benefit of the beneficiaries. Is he personally liable to the creditors of the business? What claim (if any) have such creditors on the trust estate itself? [162, 357]

172. What are the rights of the trustee and the beneficiaries respectively with regard to the custody of and access to the deeds relating to the trust property? [162]

173. Can a man, by availing himself of property vested in him as trustee, acquire the Parliamentary franchise? [163]

174. Where a trust does not exhaust the whole of the trust property, and there is no one in whose favour it can result, what happens to the property? In what respect is the law on this point different from what it was before 1884? [163, 164]

175. A bastard mortgaged his realty and leaseholds in 1880 and died intestate and a bachelor in 1883, without having redeemed the mortgage, which was still subsisting. How did the property devolve? Supposing that he had lived till 1885, how would it have devolved? [163, 164]

176. What is the duty of a trustee when he accepts a trust? [165—167]

177. Under what circumstances is a new trustee liable for breaches of trust committed by his predecessors? [166]

178. A money-lender intending to advance money on the share of a beneficiary in trust funds asks the trustee whether the share is already encumbered. Is the trustee bound to give an answer? If he does answer, is he liable if he unwittingly makes a false statement? [167, 275]

179. A trustee leaves the trust fund under the control of his co-trustee, who speculates with it and loses it. Is the first trustee liable? [167]

180. To what extent is a trustee bound to obey the directions of the settlement? [167—175]

181. If all the persons beneficially interested under a settlement concur in requesting the trustee to deviate from its directions, (*a*) can he safely do so, and (*b*) is he bound to do so? [167, 168, 295—300]

182. A trustee is directed by the trust instrument to sell certain property at a certain date. Without any valid reason he puts off doing so, and subsequently the property (without any further default on his part) becomes much depreciated. Is he liable for the loss to the trust estate? [168, 169]

183. Under what circumstances and to what extent can the court authorise a departure from the strict terms of a trust, so as to relieve the trustees from consequent liability? [168, 171—175]

184. Illustrate the principle that a trustee must act impartially between the beneficiaries of the trust. [175—181]

185. A company has power either to distribute its profits or to convert part of them into new capital to be divided amongst its shareholders. How should a trustee of shares of such a company deal with such accretions respectively? [175, 177, 178]

186. How should a trustee deal (as between a tenant for life *cestui que trust* and a remainderman) with any profit made on a change of trust investments? [175, 178]

187. How is income directed to be accumulated beyond the statutory period to be treated, as between a *cestui que trust* tenant for life and a remainderman? [175, 179]

188. If a trustee pays out a share, that is then payable, to one beneficiary, is he liable for any depreciation of the trust fund which may subsequently occur, with the result that the other beneficiaries get less than the first? [175, 176, 179]

189. Discuss the propriety (in the absence of express directions) of trustees appropriating particular parts of the trust property to answer particular payments to be made in the future. [180, 181]

190. State the rule in *Howe* v *Lord Dartmouth*. [181, 182]

191. By what principles should trustees be guided in dealing with property of a wasting or reversionary nature? [181, 182]

192. A testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, with remainders over. Part of the property consisted of leaseholds. What are the wife's rights in regard to the latter? [181, 182, 184]

193. Give instances of dispositions of such a nature as by implication to negative the application of the rule in *Howe* v. *Lord Dartmouth*. [184—186]

194. Where property ought to be converted and the proceeds invested, on what principles are adjustments between the tenant for life and remainderman to be made, pending such conversion? [187—197]

195. State and explain the decision in *Brown* v. *Gellatly*. [187, 192, 193]

196. Part of the property settled by a will consisted of a policy of assurance on the life of a person younger than the tenant for life under the trusts of the will and likely to survive him. On what principles should the policy money be dealt with if, nevertheless, the assured person dies first? [187, 188, 194, 195]

197. Upon realisation of an insufficient security (being part of a trust estate under a will), on what principles must the money realised be divided as between tenant for life and remainderman? [188, 195, 196]

198. In breach of trust, but not at the instigation of the tenant for life, trustees invest in speculative securities which for a time bring in a higher income, but ultimately cause some loss of capital. To what extent can the tenant for life be called upon to share in such loss? Supposing there had been no loss of capital, could the remainderman successfully claim from the tenant for life any part of the excess of income he has been receiving by reason of the speculative nature of the securities? [188, 196, 197]

199. Explain and illustrate the principles on which outgoings are to be borne by the *corpus* and income of trust property respectively. [197—208]

200. Part of a trust estate consisted of partly paid-up shares. On a call being made, how should it be met? [197, 200]

201. A business is vested in trustees in trust for successive tenants for life and a remainderman. One year's trading produces a net loss of 1,000*l*. How is this to be borne (*a*) if the testator directed the business to be carried on by the trustees, or (*b*) if he directed it to be sold at their discretion and they are merely carrying it on in the meantime until they can secure a purchaser? [197, 202]

202. Discuss and illustrate the incidence of money spent on repairs, as between income and capital, under varying circumstances. If

property is left by the testator in bad repair, is a tenant for life bound to contribute towards putting it into good order? [198,203—207]

203. Under what circumstances should legal expenses incident to the administration of a trust be borne by income, and when by capital? [198, 207, 208]

204. State and illustrate the general nature of the liability of trustees. What degree of care is expected of them? [208—219, 420]

205. Is the liability of a trustee for a breach of trust affected either (1) by the fact that he has acted on the advice of a solicitor or on counsel's opinion, or (2) the fact that under the trust instrument he draws a remuneration for acting as trustee? [209]

206. What are the duties and powers of trustees in relation to debts due to the trust estate? [210—212, 288, 289]

207. What are the duties of trustees in relation to (*a*) the sale (duly authorised) of trust property; (*b*) the purchase of property with trust moneys (applicable for the purpose)? [213—216]

208. Is a trustee liable for the theft of trust property by a stranger? [216, 217]

209. Discuss the liability of a trustee who has been induced by fraud or forgery to hand part of the trust property over to the wrong person. [216, 217, 237, 238]

210. What is the duty of a trustee in relation to money received by him and forming part of the trust property? [218]

211. Is a trustee bound to see that the trust property is kept in good repair? If so, and if it gets out of repair and he has no ready money available to put it right, what course would you advise? [218]

212. A beneficiary desires his trustees to commit a breach of trust for his benefit. One of them agrees to do so; the other refuses, but arranges to retire from the trust, with a view to being replaced by a new trustee who has no such objections. If the breach of trust is committed after his retirement, is the retiring trustee liable? [219]

213. State the duties of a trustee in relation to the investment of trust funds. [219—221]

214. It is a sufficient defence for a trustee, if he proves that he has invested the trust property in securities authorised by the settlement? [219, 229—232]

215. What precautions should trustees take when contemplating an investment of trust property on the security of a mortgage? [220, 232—237]

216. Which (if any) of the following are suitable investments for trustees (in the absence of any express directions)?—

(*a*) London County Council stock.

(*b*) A freehold ground-rent in the City of London.

(*c*) A legal mortgage of copyholds in England.

(*d*) A contributory mortgage of freeholds in England.

(*e*) A sub-mortgage of freeholds in England. [222, 232, 233]

217. A trustee by mistake pays over to the tenant for life moneys which should have been added to the capital of the trust fund. Is the trustee liable to make good the loss, and can he recover it from the tenant for life? [237, 239]

218. On the division of a trust fund the trustee pays over a share to a beneficiary who had incumbered his interest in the fund. Under what circumstances (if at all) has the incumbrancer any remedy against the trustee? [238—240]

219. When and to what extent may a trustee delegate his duties and powers? [240—254]

220. In cases where it is lawful for a trustee to employ an agent, will the trustee ever be liable for the agent's mistake or wrong-doing? [242, 243, 247, 248]

221. For what purposes may a trustee employ a solicitor, and to what extent (if at all) is he liable for any negligence on the part of the solicitor he employs? [244, 246—249]

222. Under what circumstances would a trustee be justified in leaving trust moneys in the custody of a stranger to the trust? [241, 248—254]

223. A trustee having uninvested trust money in his possession deposits it with a bank pending investment. The bank fails and part of the money is lost. Is the trustee liable to make good the deficiency? [254]

224. There being a difference of opinion among the trustees of a private trust, the majority of their number insist that their views must prevail. Are they entitled to take up such an attitude? What would happen if the minority persisted in refusing to act as desired by the majority? [254, 255]

225. Are trustees bound to act jointly in the receipt of trust moneys, or under what circumstances can they delegate such a duty to one of their number? [255—257]

226. A trustee is authorised by his co-trustee to collect the rents of trust property, giving receipts which have been signed beforehand by both trustees. The collecting trustee misappropriates the money he collects: under what circumstances would the other trustee be (*a*) liable, or (*b*) not liable, for the consequences of his co-trustee's misconduct? [255—257]

227. Are trustees justified in allowing the title deeds of trust property to remain in the custody of one of their number? [258]

228. Trustees are informed, on what appears to be good authority, that part of the "trust property" really belongs to a third person, and not to the trust at all. What should they do? [258—260]

229. Under what circumstances is a trustee entitled to remuneration? [260—263]

230. When and to what extent is a solicitor, who is also a trustee, entitled to remuneration for work done in connection with the trust? [260—262]

231. Is a trustee, who is carrying on a business very advantageously for the beneficiaries, entitled to any remuneration for his time and trouble—(*a*) under an express trust containing no provision as to remuneration; (*b*) when the trust is constructive? [260, 262, 263]

232. Illustrate the principle that a trustee must not use trust property for his private advantage. [263—267]

233 Under what circumstances (if at all) can a trustee purchase the trust property? [264, 267—272]

234. A purchase of trust property made by a trustee from a beneficiary is subsequently impeached by the latter's representatives. On whom does the *onus* lie, and what must be proved? [264, 270]

235. What are the duties of trustees and the rights of beneficiaries in relation to the accounts of the trust property? [272—275]

236. Is a trustee bound to allow a beneficiary to inspect the trust documents and accounts? Is he bound to supply him with copies of the same? [272, 273, 275]

237. State the duties of a trustee as laid down in *Low* v. *Bouverie*. [275]

238. When a discretionary power is expressly given to trustees, will the court in any way control the exercise of it? [276—279]

239. Explain the decision in *Gisborne* v. *Gisborne*. [277, 278]

240. Trustees holding land in trust for an infant have express powers of management, with power to lease at their discretion. Can they be compelled to lease? [278, 279]

241. What are the general powers of trustees in relation to the trust property, other than such as are expressly conferred on them by the settlement or by statute? [276, 279—283]

242. What are the general powers of trustees with regard to the allowance of moneys by way of maintenance or advancement of infant beneficiaries? [282, 283, 290—292]

243. State the general powers of trustees in relation to the conduct of sales, when they are selling under a trust or power? [284—287]

244. May trustees, when selling land under a trust for sale, reserve the minerals with the necessary powers of working the same? [284]

245. Are trustees for sale of leaseholds entitled to dispose of them by way of underlease for the remainder of the term less one day? [285—287]

246. What is the effect of receipts given by trustees to persons paying money to them for the purposes of the trust? [287]

247. To what extent have trustees power to compound debts due to the trust estate? [288, 289]

248. When does a contingent gift include the intermediate income so as to enable trustees to allow maintenance out of such income to an infant contingently entitled to the *corpus*? [290, 291]

249. Can trustees safely pay money to a person holding a beneficiary's power of attorney? [292]

250. What is the effect (in general terms) on the powers and duties of trustees of the institution of legal proceedings taken for the administration of the trust, and what is the effect of an administration decree? [293, 294]

251. What is the effect on the powers of trustees of their having paid the trust fund into court? [294]

252. Under what circumstances can the beneficiaries jointly put a stop to a trust? [295—300]

253. What is the effect of a direction in a will that the residue shall be put out at interest to accumulate, and with the accumulations shall be transferred to the testator's infant son on his attaining the age of twenty-four, subject to a gift over if he should die under twenty-one? [296, 297]

254. Where (*a*) an estate is held upon trust for sale, or where (*b*) trustees have a power of sale over it, can the beneficiaries insist on its remaining unsold and being divided amongst them? [298, 299]

255. Where land is held in trust for a man for life, with remainder in trust for his wife for life, with an ultimate remainder in trust for the issue of the marriage, and the wife is past the age of child-bearing, (*a*) would it be safe for the trustees, at the request of the husband and wife, to convey the property to them, and (*b*) can the trustees be compelled so to do? [299, 300]

256. What are the powers of an individual beneficiary in relation to the trust property? [301—303]

257. Does the restraint upon alienation, which is frequently imposed upon a married woman, cease upon her divorce? If so, would it revive if she re-married? [301]

258. Does the restraint on alienation imposed upon a married woman tenant in tail prevent her during coverture from barring the entail? [302]

259. How far can an equitable tenant for life claim actual possession of the settled property? [302, 303]

260. Upon the death of one of several trustees, what happens to (*a*) his office and (*b*) his estate in the trust property? Does the occurrence affect the powers of the trustees as a body? [304, 305]

261. Upon the death of a sole (or last surviving) trustee, what happens (under the existing law) to—(*a*) the trust property; (*b*) the

powers conferred by the settlement on the trustee or trustees thereof? [306—311]

262. In what particulars has the law regarding the devolution of trust property upon the death of a sole or last surviving trustee been modified from time to time since the year 1874? [306—308]

263. Under what circumstances can the person, upon whom trust property has devolved by reason of the death of the last surviving trustee of a settlement, exercise the duties and powers confided to trustees by the settlement? [306, 308—311]

264. Can a last surviving trustee devise the trust property under the existing law? [306, 308, 310]

265. In what respects does trust property of copyhold (or customary) tenure devolve differently from other property, upon the death of a sole trustee? [306—308]

266. Under what circumstances can a trustee, after acceptance of the office and estate of trustee, retire from the trust? [311—316, 319, 321, 322]

267. Under what circumstances can a trustee be removed from his office of trustee? [312, 315, 317—322, 326]

268. Under what circumstances can new trustees be appointed? Who can be appointed trustees in such cases? [314—330]

269. Is it necessary that the number of trustees should always remain the same as it was in the original appointment? [304, 305, 311, 313, 315, 316, 319, 320, 327]

270. To what extent does an express power to appoint new trustees affect or exclude the ordinary statutory power? [314, 318, 322]

271. What is the proper course to adopt when an appointment of new trustees is desired but the power of appointing them is vested in a lunatic? [315, 322, 323]

272. What is the proper course to adopt when a sole trustee becomes a lunatic and it is desired to displace him and get new trustees appointed? [315, 323—326]

273. Under what circumstances will the court appoint new trustees? [315, 323—327]

274. By what principles is the court guided in selecting persons to be new trustees? [316, 327—330]

275. Can the donee of a power of appointing new trustees appoint himself to be one of them? [316]

276. What are the objections to the appointment as new trustees of (*a*) a married woman, (*b*) a person domiciled abroad, (*c*) an infant? [316, 328—330]

277. How is the trust property transferred to new trustees on their appointment as such? [331—341]

278. What is a "vesting declaration," and under what circumstances is it effectual? [331—333]

279. What is a "vesting order," and under what circumstances can one be made? [331, 333—341]

280. Under what circumstances may a separate set of trustees be appointed for part of the trust property? [341, 342]

281. When a donee of a power of appointment (which enables him to create new trusts) exercises such power, to whom can he confide the administration of the new trusts so created? [343—346]

282. Under his marriage settlement A. has a general power of appointment exercisable by will. He exercises it by his last will and dies without having made any provision as to who is to act as trustee for the appointees. Can the original trustees of the settlement claim to continue to act as trustees? [343, 344]

283. Illustrate the principle that a trustee has a right to be reimbursed all expenses properly incurred. [347—356]

284. Explain the decision in *Dowse* v. *Gorton*. [347, 349]

285. Illustrate the principles on which trustees are sometimes deprived of costs in litigation. [350—352]

286. Explain the nature of a "trustee's lien." [347, 353, 354]

287. Is a trustee's right to indemnity (as against a beneficiary) limited to the amount of that beneficiary's interest in the trust fund? [347, 348, 354—356]

288. Explain and reconcile with each other the decisions in *Hardoon* v. *Belilios* and *Wise* v. *Perpetual Trustee Co.* [347, 348, 354—356]

289. Does a trustee who is indebted to the trust estate lose his right of reimbursement for costs properly incurred on behalf of the trust? [348, 356]

290. What is the position of persons to whom a trustee has incurred liabilities for which he is entitled to be indemnified out of the trust estate? Under what circumstances and on what principle can they claim to have the benefit of such indemnity? [348, 357, 358]

291. What are the rights of a trustee when the trust comes to an end? [358, 359]

292. Under what circumstances have trustees the right to obtain the direction of a judge? What is the modern mode of procedure in such cases, and what kind of questions can be decided on it? [359—361]

293. Give instances of matters relating to a trust which cannot be dealt with on an originating summons. [360, 361]

294. Under what circumstances are trustees justified in paying the trust money into court, and when would such a course be inadvisable? [361—363]

295. Under what circumstances is a trustee entitled to take proceedings to have the trust administered by the court? If such

proceedings are improperly taken, what liabilities does the trustee incur? [363—367]

296. Compare the old practice with the modern rules (since 1883) as to the institution of proceedings for the administration of trusts by the court. [364—367]

297. A testator directed his trustees to commence proceedings for the administration of the trusts of the will. Are the trustees bound to do so, and is the court bound to order general administration? [367]

298. What is a judicial trustee, and under what circumstances and by whom can one be appointed? [368—370]

299. What is the measure of a trustee's responsibility for a breach of trust? [371—377]

300. Under what circumstances and at what rate can interest be claimed from a trustee who has committed a breach of trust? [371—376]

301. A trustee, who was directed to accumulate a trust fund during the infancy of the tenant for life, left the money uninvested for several years. What is his liability? [372, 374]

302. What is the liability of a trustee who uses trust funds in his own business instead of investing them in authorised securities? [372, 375, 376, 388]

303. A trustee improperly advanced half of the trust fund on a mortgage which would have been a perfectly proper security for a third of the fund, but was not adequate security for the half actually advanced. He also advanced the other half on a mortgage which was entirely improper and unauthorised. What is the measure of his liability in each case? [373, 376, 377]

304. Is the liability of defaulting trustees joint or several? [378]

305. If one trustee has actively committed a breach of trust, and the others have merely acquiesced in it and taken no steps to put it right, are all equally liable? [378]

306. Under what circumstances can a trustee set off a gain which the trust has made against a loss which it has suffered, when both were due to his breach of trust? [379, 380]

307. What is the rule as to trust property which a trustee has in breach of trust converted into some other form? [381—382]

308. Money is handed to a broker for the purpose of investing it in Consols. He invests it in brewery shares, absconds, and becomes bankrupt. What are the rights of the owner of the money and the broker's trustee in bankruptcy, respectively, in the brewery shares? [381]

309. A trustee in breach of trust invested trust moneys in the purchase of land, which he subsequently contracted to sell at a considerable profit. Are the beneficiaries or any one or more of

them entitled to insist on his keeping the land in trust for them? Would it make a difference if one of the beneficiaries is an infant? [381—383]

310. What is the rule when a trustee has mixed trust moneys with his own moneys? [381, 383—386]

311. A trustee pays into his own banking account (which stands at 500*l.* to his credit) 1,000*l.* of trust moneys. He then draws out 800*l.*, which he spends in paying some of his own debts. Soon afterwards he becomes bankrupt. His trustee in bankruptcy claims the 700*l.* remaining in the bank. Is he entitled to it as against the beneficiaries under the trust? [381, 383—386]

312. A trustee having overdrawn his banking account to the extent of 100*l.*, pays in 200*l.* out of the trust moneys (but without informing the bankers that the amount is subject to any trust). What are the rights of the beneficiaries as against the bankers? [385, 421, 422]

313. What steps can be taken when it appears that trust property is in danger by reason of the incapacity or dishonesty of the trustees? [386—388]

314. At whose instance will the court interfere to protect trust property which appears to be in danger by reason of the incapacity or dishonesty of the trustees? [386—388]

315. When is a breach of trust a crime? What formalities are required for the institution of criminal proceedings in such a case? [388]

316. Under what circumstances can the court give relief to a trustee who has become personally liable by reason of a breach of trust? Illustrate the principles on which the court acts in such cases. [389—391]

317. Under what circumstances can trustees (and persons claiming through them) avail themselves of the Statutes of Limitation as a defence? To what extent could they do so before 1888? [392—397]

318. Under what circumstances is a trustee liable for the default of his co-trustee? [397—399]

319. Under what circumstances could a trustee effectually plead as a defence to an action founded on a breach of trust the concurrence of a beneficiary in such breach? [399—404]

320. To what extent does mere acquiescence on the part of a beneficiary constitute a defence to an action against the trustee for breach of trust? [399, 401]

321. A trustee at the request of a beneficiary (a married woman) commits a breach of trust. Can she afterwards make him liable for such breach? [402, 403]

322. Illustrate the principle that a release given by a beneficiary to a trustee will not avail unless the beneficiary had full knowledge. [399, 403]

323. Can a beneficiary, who retains the benefit of a breach of trust committed without his knowledge, sue the trustee for such breach? [403, 404]

324. When several trustees have committed a breach of trust, under what circumstances can one of them claim contribution from the others? [404—410]

325. A., a trustee, allowed B., his co-trustee, to have the trust fund with a view to investing it. B. handed it to an "outside broker," who misappropriated it. B., having been made liable for the loss, seeks contribution from A. Is he entitled to it? [404, 405]

326. When two trustees, one of whom is also a beneficiary, commit a breach of trust, what is the rule as to their liability for the breach? [404, 406]

327. When two trustees have committed a breach of trust, under what circumstances and on what principle (if at all) can one of them claim to be entirely indemnified by the other? [404, 407—408]

328. A trustee at the request of one beneficiary commits a breach of trust, for which he is subsequently sued by another beneficiary. Under what circumstances and to what extent can the first beneficiary be made to indemnify the trustee against the liability he has incurred? [405, 408—410]

329. State generally and illustrate the liability of persons, not being trustees, who knowingly meddle with trust funds or assist in a breach of trust. [411—414]

330. A person indebted to the trust estate happens also to be a beneficiary under the trust. Can the other beneficiaries insist on the trustees retaining the amount of his indebtedness out of the moneys payable to him as beneficiary? [411, 415—418]

331. State fully the rule of equity as to following trust property into the hands of third parties. [419, 420]

332. Illustrate the maxims (1) "where the equities are equal the law prevails," and (2) "as between equitable claimants *qui prior in tempore, potior in jure est*." [419—421, 427—429]

333. Explain and illustrate what is meant in equity by "notice"; and distinguish between actual and constructive notice. [419—429]

334. What constitutes actual notice? Is the source of the information material? [422, 423]

335. Discuss the following propositions: (1) "actual knowledge acquired by an agent is constructive notice affecting his principal"; (2) "knowledge of the existence of a deed is constructive notice of all its contents." To what limitations are these principles subject? [423—425]

336. A trustee by a voluntary conveyance transfers part of the

trust property to his son, who has no notice of the trust. Can the latter retain it as against the beneficiaries? [419, 426]

337. A. has acquired trust property for valuable consideration and without notice of the trust. Can B., who has notice of the trust, safely buy the property from A.? [419, 420, 427]

338. A trustee deposits a mortgage deed (part of the trust property) with his bankers to secure an overdraft on his own personal account. What are the rights of the bankers and the beneficiaries respectively when this breach of trust is discovered? [419, 427]

339. Explain the rule that choses in action are generally taken subject to all equities affecting them. What exceptions are there to this rule, and on what principle are they excepted from it? [420, 428]

340. Under what circumstances may a *bonâ fide* purchaser for value of an equitable interest, without notice of an express trust to which it is subject, protect himself after he has got notice thereof by getting in the outstanding legal estate? And in what cases may he not do so? [428, 429]

341. A trustee in breach of trust sells some shares (part of the trust property) to a person who knows nothing of the trust. After the purchase money has been paid and the transfer signed (but before it is registered in the company's books), the purchaser discovers that the shares were sold in breach of trust. Is he justified in getting the transfer registered? [428, 429]

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